FRED,K CHITTENDEN.
KENT. C,T.
NO. 34

Charles B. Andrews
May. 12th 1824

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Presented to Charles B. Andrews

by

Fredk Chittenden

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NOTES

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Lectures

ON

LAW.

By The

Hon. Daniel Dulle.

VOL. II.

1824

LAW.

TREATISES - STACK ROOM


Actions
of
Debt. & Detinue.
Account.

Action of Debt

1 Debt in the legal acceptation of the words is defined by Blk to be a sum certain due by certain express Contract 3 Blk 154 " Esp Dig 172.

2. But debt lies not only for a sum ascertained but for one which may be ascertained as by reference to a known and certain standard. A gives B an obligation to pay him the Amt of a certain Exchange without stating the sum. it is a debt and can be ascertained by reference to the Exchange Dougl. 6. 1 Wh Blk 550

3. Blks doctrine is in one respect incorrect. His learned was not deemed so at the time he wrote. the word express in his definition is not incorrect but superfluous, for an Ac. of debt will certainly lie on Contracts implied as Sells goods to B at a fixed price who takes them the Ac. of debt lies tho B makes no express contract to pay. 4 Co. 94 " a. 1 Blackstone says that debt will never lie on an implied Contract to pay an uncertain sum 3 Blk 155. I think this clearly incorrect at the present day It is clear that the vendor of goods may maintain debt for their actual value when there was no express promise to pay; not certain price fixed 1 Wm Blk 550. 2 Bac 13;

3. It is settled at this day that the Plff can recover upon them the sum due for, the ancients he could recover only that sum

4. It seems clear that debt will lie on an uncertain sum with an implied promise 1 Wh Blk 550

5. This Action lies either on a Specialty or a Judgt or a Recognizance or Com Law, it lies also by Stat in other Cases as per text writers

Debts.

for a recovery of a penalty inflicted by Stat and no mode of recovy appt by Stat.

5. Debt on simple Contract shd for a long time been discussed in Engd on acct of 2 impediments 1st a Wager of Law, which rendered the recovy of any debt precarious 2. On acct of the rule in Chancery practice that the Pff could recover nothing unless he established his claim to the Amt stated 3 Blk 155. 2 Lutt 165 3 Blk 341 Chitty on Bills 219

7. The Action of debt has recently been revived in Westm. 2d Chitty on Bills 219

8. Debt on a simp Contract does not lie against the Representatives of the debtor but only against the debtor himself. for the reason of Wager of Law. Plow 182. 1 Lewis Dow Chitty on B. 219, Com Dig 172, Dev 87.

9. Debt lies not only on a Contract purely verbal but on a promissory note against the maker, this has never been positively determd, but it is undoubtedly Law. 10 Mod 38, Chit on B. 221. for a note is for a sum certain

10. Whether debt will lie against the Indorser of a note promissory is a Question vexata Stra 630 8 Mod 373. Com Dig 173 Chit on B 221. I think it will not lie vs the Indorser for tho in some way liable he is not the debtor but an assumpsit by the maker. If one expressly promise to pay a certain sum for property delivered to his use or for services rendered himself (debt) debt lies against him and is concurrent with Assumpsit but if he promises to pay for goods delivered to another for which this other is made debtor, debt will not lie against the former tho the sum is certain

Debt.

the distinction between original and collateral promises is applicable in this case Esp Dig 173 - 3 Barn 1856 2 Bac 20 Yet debt. Cro E. 880. For the latter class of cases the remedy is especial ac of Assumpsit. Cro Car 107. 40. 93. Esp Dig 173

11. In the case of collateral promise the remedy is the special action of Assumpsit, Esp Dig 173 Cro Car 107. 40 93

12. An action of debt sometimes, when there is no bargain in any thing in the nature of a contract, expressed or implied as where a penalty is given, by Act to the Party action either in whole or in parts. 1 Roll 598: 2 Bac. 14-

The theory by which the claim is put under the denomination of debt, is on circuitous in that every individual in Community impliedly promises to do or pay whatever the Law imposes upon them. This is the only reason assigned for the rule.

13. An action of debt when brot to recover a Penalty is a civil action and Governed by the rules of Civil Actions.

This distinction is frequently material. Sometimes alters the rule of Evidence. Evidence is often admissable in civil actions when not in Crimes.

14. The form and not the object of the proceeding is the criterion to determine whether an action be civil or Civil 7 Rep 25. 2 Ld Raym 203. 3 T Rep 443. Comp. 382 4 T Rep 756.

15. An action of debt never lies to recover damages, in this respect it is exactly the reverse of Cov. Broken. & Assumpsit they lie only for damages.

16. But when a Plff has recovered Judgt. for damages Debt will lie on the Judgt. 2 Bl Rep 465. Hob 206 1 Roll 600

17 Debt will lie on an award of Arbitrators. In a sum ce-

Debt

-tion or on Attat can be made certain, indeed when an Action is founded on an award (indeed) I know of no other Action that can then be brought and therefore no other will lie Stra 923.

18. Debt will lie on a Judgt.

19. But if the debt has been taken and confirmed upon execution on a Judgt. Debt upon the Judgt. will not lie so long as he continues in Custody, for the taking of a Body in Exn is for the time being a satis-faction in judgt. 2 Lord. 4 Burr 2482. 1 Bl Rep. 123 7. do 420. 6 do 525. 1 do 557. Esp Dig 196. 3 Mod 13.

20. One of the Defts on a Judgt having taken a Letter in execution, voluntarily, and Charges himself from Custody he can never after capture the Judgt. in any way, his Goods & Chattels & Goods.

21. So if upon Judgt recovered the Defts. goods are taken and estimated by the Sheriff to be sufficient to pay the execution the Plff cannot sue the goods are out of the Sheriffs custody upon the Judgt in any way, is Acct, Salk 323. 2 Mod 214. 1 Keb 551.

22. But when goods thus taken are not sufficient to sat-isfy the goods taken on the Execution Debt on Judgt or will lie while the goods are in the Sheriffs hands 1 Lev. 92. Esp Dig 196.

23. When Debt on Judgt will lie the Plff may either bring & sue out a new Execution or Sci. Fa. by the Rule of Com Law. An execution cannot issue upon a Judgt after the elapse of one year & a day from the signing of the Judgment, at Com Law (this only)

this only remedy is debt on Judgment 1 Sid 351 Carth 30 2 Bac 361. 362.

The reason assigned is that after such an elapse of time, no Ex^tion having issued it is to be presumed that the Judg^t has been satisfied. The truth is the Law rather suspects than presumes satisfaction. If it was presumed the onus probandi would remain upon the Pl^ff whereas it lies upon the Deft. the object of the rule is to give the defendant an opportunity of shewing that the Judg^t has been satisfied which is the case. But by the Stat Westm. 2. 13. Edw. 1. after the lapse of a year and a day the Pl^ff may have a Sci-fa calling on the Deft to shew cause why execution should not issue

24 " I think Interest cannot be granted on a Sci-fa on a Judgment — Cro Jac 364. 6 Mod 288 Carth 283. 284. 2 Bac 362

25 " But to the general rule that execution cannot issue a Judg^t
Ex. after a year & day there is an Exception in case of an Ex^tion being superseded by an unsuccessful writ of error in such case I think the Pl^ff will be allowed the same time after the Judg^t of affirmance, as before.

26 From the rule that debt on Judg^t will lie after the lapse of 1 year & day it has been held that debt will not lie till after the elapse of that period. This I think clearly incorrect The reason why it will lie at that time is inconsistent with the reference for it is said to lie as a punishment on the Deft and in point of fact debt is brought within the time 2 Bac 14 Carth 80 2 Bl R 421 1 Wils 687 when Judgt was rendered for Pl^ff and the action of debt was commenced in 3 months after.

Debt

27. When a judgt on one of cases where in Chc. and the other State debt on judgt is the only remedy viz. when judgt is rendered by a single Magistrate and he dies before execution issues. A sci fa cannot be brought upon execution upon, because the Court who gave Judgment ceased to exist.

28. There is also another class of cases in which debt on judgt is an indispensable remedy, viz when full satisfaction cannot be had even tho the execution should issue, as if a judgt debtor absconds with all visible property, the proceeding in this case is by foreign attachment Kir 311. 421.

29. So where Judgt has been obtained in another State and the defd removes into this with all his visible property, debt on Judgt is the only remedy in the State to which he removes Kir 177.
By debt on Judgt the Defd may recover Interest on the Judgment he cannot by sci fa.

30. And in an action of debt on Judgt it is no objection that the original party to Judgt is the fact erroneous. For an erroneous Judgt until reversed by due course of Law is as effectual to every intent as a Judgt which is proper in Law 7 T Rep 458. 8 Co 142. a & b. 2 Bac 211. 3 Wils 345.

31 But in a void Judgt debt cannot be supported it is in Law a Carte Blanche, as a Judgment obtained before a Court which has no cognizance of the offence and the subject matter Ha. Ev. 76. 8. Mod. 762 3 Wils 345 Bac Abr. tit. Torts G. if false imprisonment

Debt

32. An important question has arisen under the const. of the U.S. which forbids that full credit shall be given in each of the States to the records and judicial proceedings of each of the respective other States Const. U.S. Art 4. Sec. 1.

The question is whether a Judgment recovered in one State is to be considered as a foreign Judgt a conclusive of the right which it purports to establish

Some have held that the whole amount is no more than that a record of one State should prove that such proceedings as it purports have been had but not that they were conclusive 1 Dall 219. 01. 183. 1 John 426. Cainer 460. Contra Comyn.,

It has since been decided in N. York that if a Judgt is recovered in any other State in a case where the Defdt was personally summoned & personally appeared the judgment is conclusive unless it is shown to be irregularly obtained 8 Johns 173. 15 do 121. 5 do 37

But the Ct of N. York now hold that if the defendant had not personal notice of the action debt could not be in that State on the Judgt 8 Johns 86. 5 ib 37

By decision of the U.S. Court it is settled that a Judgt of a State Court has the same credit, validity and effect in every other State within the U. States, as it has in the State in which it was rendered and that such plea or pleas as would be good and that such pleas as would be good to suit them in such State must be pleaded and no other can be pleaded in

Defl

in any other State in the Union 7 Cranch 481 3 Wh. 234 - nance if a Judgmt rendered in one State is made the ground of a suit in another. "nul tiel record" is the proper gen. issue.

33. But the rule is different in the case of an action to enforce a foreign Judgt
Defl will be in a foreign Judgment but the Judgmt is treated with the same solemnity as a simple Contract. Hence the Defl may contest the whole of the original merits. The foreign Judgt is only prima facie evidence of a ground of action Doug 2 Hen BlkR 410

34. This rule does not apply to foreign contracts acting under the Laws of Nations

35. When an Ac is brot here to enforce a foreign Judgt the Defdt may contest and dispute it, but when it is used in any mode by way of defence to an action brot here it is as conclusive as a Judgt of our own Ct. 2 H Blk 410 Ray 473. 2 Show 232.
The reason of this distinction is, when the action is brot here to enforce a foreign Contract: Judgt the Defdt voluntary submits to the jurisdiction, but when used by way of defence the proceeding is to the defdt, "in invitum," he is forced to submit to the jurisdiction of our Courts, ——— From what has been said it appears of course that "nul tiel record" is a void plea to a foreign Judgt because it is not considered as a record
36 Declaring on a Foreign Judgt as a record does not obviate the declaration it is mere surplusage Doug

Debt

38. The action of Ind. assumpsit is concurrent with debt on a foreign Judgt but Assumpsit can never lie on a record Doug 4.5.

39. 6. When a recovery is had in debt on a foreign Judgt it draws interest. Like a Judgt of our own.

40. It is enough that the sum be liquidated as it is by a foreign Judgt 1 Caines 436.

41 It has been said that where Ind. assumpsit will lie assumpsit on record or specialty "debt" will also lie Doug 6.

But this is by no means universally true. The converse would be more gen. true

The action of debt will not lie for money paid by mistake, nor where obtained by fraud nor where obtained by breach of Contract but Assumpsit Ind. will lie in these cases. A wrongfully obtains receives money for the property of B. debt will not lie but assumpsit will and will ever lie.

The rule that debt will lie when indebitatus Assumpsit will is to be understood as holding only in express contracts to pay money and of those promises which are implied from an actual contract

When one purchases goods and promises expressly to pay, Debt and Assumpsit are concurrent

So when one purchases goods at a fixed price without any promise &c

Same rule holds where labour is to be done & where there is a fixed price & not for where the promise is not express it is to be implied.

42. It is settled that debt will not lie upon a Judgt obtained by foreign Attachment.

This has been determined in N York.

Debt

The Object of a writ of Foreign Attach.t is to draw the effects of the absconding debtor. out of the hands of his debtor. If the proceeding fails in that Object it fails in toto.

43. For money secured by bond or single bill D.-bt is the only Com Law remedy. Co & 494. 608. 187 Esp Dig 198.

44. A Lotte informal bill is now used called a due bill, "due A B $100 on demand" &c.
I conceive debt the most proper action it is an inf.-orme single bill.

45. A nother class of cases in which debt lies is called a recognisance. the Stat.s here and in Eng.d have provided an additional remedy by Sci-fa-

46. Esp. Dig 198. On a single bill in common form debt lies immediately. for it generally appoints no future time of payment so debt will lie on a Bond as soon as delivered if there is no time for future payment fixed 7 S. Rep 124. if there is no time fixed it is by construction of Law payable immediately
There are obligations when they are payable generally a without any time specifically appointed

47. One instance occured in which the condition of a bond was directly the reverse to what it should have been
A gave B. a bond with condition it should be void if A did not pay and &c. by a certain day On non payment at the day the Court held the Deft liable. Doug 639.

48. If a bond be given for the performance of some collateral contract there is a remedy in Ch.y on the Condition of the bond.

Debt.

Chan Courts will often regard as evidence of an Ex. agreemt to perform the act. A gives B a Bond to pay a penalty unless he convey to B, &c. Equity will treat it as evidence of a Covt to convey & will compel conveyance

48. When in the Judgt of a Court of Equity a recovery of a penalty at Law will not be an adequate remedy. Equity will decree a specific Ex. but if that deems the penalty at Law an adequate remedy it will not decree a specific performance 2 Bac Ab.

49. There are some cases in modern times in which the Plff in debt on bond has recovered damages exceeding the penalty itself

2 S. Rep. 338. Doug 44. 1 Bac. 820. 4 Burn Bac 2228. 2 Blk 432. 2. Saund. 106. Pors. a Con. 146. this it must be agreed deviates from the strict performance of the bond,

= Later authorities are against this rule 1 Ewn 436. 1 Atk 475. 1 Burr Ch. 489. 96, 2 Blk Rep 1190 3 Ewn 604.

50. Chan Courts have held that Interest can be recovered on the penalty 4 Day, 30. 38.

51. Debt will lie on Covt for payt of a sum certain & one capable of being ascertained Stra 1084 1 Roll 591

52. When one gives a bond conditioned that he will render a fair and just account of money received the construction of this is that he will pay the amt. so that a non payment of the amt is a breach of the conditions Doug 367 2 L. R. 388.

53. If there is a Covt with a penalty — the Covenantee has his election either to sue for damages in Covt broken — or for

Debt.

the penalty, in debt, unless it appears upon the face of the record that the Covenantor was to have his election to do the act covenanted for or pay the penalty.

A enters into a covenant by which he binds himself to convey to B "in consideration whereof I bind myself to convey and in the sum of $1,000." The Covenantee here may have his election, again.

"I hereby covenant to do so & so — or pay such a sum, as a penalty." here the Covenantor has his election and the only remedy is debt for the penalty —

2 Powell 12 Bac Abr and 2 Bac 1345. 2 Atk 371. Stra 583. 2 P. Wms 192, 3. 2 Ves 528. 1 Brow Ch. 418.

54. Debt lies vs an officer for collected money on an execution or refusal to deliver it over. in buying money into his covenant by paying it over, by buying the debt the indebtedness is by operation of law transferred to the Sheriff. Hob 206. 2 Hen Bl 550 Chit on B. 220. 2 Bac 14-

55. But debt will not lie against the Sheriff for specific articles taken under exec. which remain unsold for want of purchasers. Debt is for a sum of money and which the goods remain unsold, the has not received the money Hob 206 Co Jac 514

56. But if a Sheriff takes goods on execution and in his return of transfer as officer to satisfy the Ex. Debt lies against him, if guilty of any neglect in not selling the property & receiving the money. I think this has not been finally determined. This neglect must be clearly shewn 2 Saund 344, n, 2 Ld Ray 1075.

57. If a Sheriff having seized goods has not them by reason

Debt.

Debt will lie - ifor on final process. Rescue is no excuse. Hob 206. Cro Jac. 514. 2 Saund 344.

58. Debt lies for rent reserved in a lease and is more than any other the appropriate remedy and in many cases the only remedy. Still if there is an express Covt for payt of rent, Covt Broken is concurrent with debt 2 Wils 58 72. Esp Dig 118.

59. But debt for rent never lies against a tenant at sufferance at Com Law, for a Tenant at sufferance is regarded as a wrong doer Esp Dig 188.

Pleadings

60. To debt on record the general issue is "Nul tiel record".

61. To debt on specialty, "Non est factum".

62. To Debt on "Fuit Con. nil debet". Statutes of Limitations "Payment" & a "Release" may be given in under or under the general issue. Or the plea being in the present tense evet of these pleas supports it.

63. But to a debt on bond these defences must be specially pleaded Salk 278. Ld Key 566. Esp Dig 262.

"Fuit" "Actionis"
" " "

Detinue

1. This action lies for the recovery of specific personal chattels and is in its effect like a Bill in Equity for specific restitution 3 Bl Com 152. Co Lit 286.
2. But the Judgt recovered in this action is in the alternative. viz that the Plff recover the specific chattels if found and if not the damages, which may be assessed. 1 Inst. Cro Jac 361. 2 Bac 45.
3. This action is sometimes of great convenience and will regard be had to personal chattels
   It is generally of no consequence whether the Deft has the specific article a value
   But there are personal chattels of value far beyond their pecuniary estimation, as Family Pictures &c.
4. It lies for chattels which can be identified and distinguished from others. but not for such as cannot be identified,
5. It will lie for a watch, a horse, but not for 20 shillings hence it is said it will not lie for money unless contained in a bag, box, &
6. It will lie for a certain Coin if it can be distinguished by any marks Com Dig detl. Bac D. Co Lit 286. Cro E 457. 1 Roll 606—
7. This action lies in those cases only in which the Deft obtained possession of the chattel in a lawful manner as by delivery of the owner finding it &c.
   for when wrongfully detained Trover lies Com. Dig. Detl. D.

Detinue.

2. Bac Dict 45. 1 Roll 607.

8. In the action of detinue is founded on a contract express or implied it has however been classed with common law actions sounding in tort
But detinue may be joined in debt, which could not be done if sounding in Tort 3 Reeve Hist Eng Laws 67, 1 Bac 28, 4 do 11, Hi-Plea. 2 Swift 20.
The gen. nature of the actions of Detinue is the same as debt.
Detinue is in substance an action of debt for the recovery of spec. articles.
Debt is an action of detinue for recovery of money 3 Bl Cp. 156. 1 Roll. 606, 2 Bac 47,

9. The action of Trover is now concurrent with detinue. Trover is not an action of Com Law, but derived from the Statute Westm. 2. 13 Ed 1–

10. There are but three actions at Com Law sounding in tort.

11. The Rule that Trover will lie when detinue will does not hold e converso. Trover lies for the conversion of property tortiously obtained but detinue will not. The reason assigned in our Books why detinue will not lie for a tortious taking is that a tortious taking was originally a divesting (a divesting) the owner of his title and specific property. I don't think such a principle was ever recognized by the Com Law
The reason I think is that detinue is founded on Contract. Com Dig Detinue D.

12. This action has been discussed for a twofold reason

Detinue.

1st The greatest precision in describing the goods was necessary. 2d The Dept could wage his Law. The latter has now ceased and the former reason has relaxed the Law now requires Convenient certainty in the description of the articles

11 Co. 370 ; Co Lec. 244. Yelv. 178.

13. In Consequence of these difficulties. The action of Trover was introduced, is ant,

But the action of Detinue has been re-

14. recently brought in Eng. & in some of the States

1 Ch. Rep 140 ; 2 Wood 106.

Action of Account

1. Is founded on an express or implied contract. That one who has rec'd property of another should account for it. If he renders the account this is not the proper action but indebitatus Assumpsit upon an "accounts Computasset" 1 Bac 16. 3d account Com Dig Ac't. A.

2. This action lies at Com Law against Bailiffs in nature only & Bailiffs & receivers

3. Lies at Com Law between Joint Merchants but each is deemed a receiver for the firm Co Lit 172. 906 Nat. as Part. p. 227, 1 Selw 1. Com. Dig Acc A.

4. By Statute this action has been recently extended by 4 Ann. Stat it is extended to Joint tenants and Tenants in Com. The Pff here describes the Co-Tenant as Bailiff and receiver — as receiving of all & more than his part. Bac. a/c. A. 17,

5. At Com Law the action lay only between the parties to the contract express or implied. but not against their Ex's &c. for it is founded on such a supposed privity of contract between the parties that each was supposed to be acquainted with the others disbursements and receipts, but this privity does not exist between receivers Com Dig a/c. B & D. Co Lit 89-90. Fitzh 117.

6. There was a single exception to this rule. Viz in case of Ex. Joint Merchants the action was extended by common Law in favour of the Receivers. But not against the receivers of a deceased partner. it is allowed as a principle of Law Merch't which is a branch of the Com Law Com Dig a/c B. Co Lit 90. B.

Account

7. By Stat Westm 2d. 13. 25. & 31 Edw. 3. this action was extended generally in favour of Ex.rs &c of a deceased person against this original guardian bailiff & receivers. but do not extend against (against) the executors of Guardians &c.

8. By the Stat (Westm 2d.) 4 Ann. extended the act against Ex.rs Adm.rs &c. of Joint-Tenants and Tenants in Com.

9. So now the action lies for and against the personal Representatives of the original party bound. 3 Bulst 164. 1 Bac 17.

10. ——— Our Stat gives the action as great a greater extent than the Eng. Law. for it gives the action to an executor, or residuary legatee against his Co. Executor & to residuary legatees against their Executors.

11. In every case except that against Guardians the Defendt is charged in the declaration as bailiff & receiver when the action is against guardians he is charged as such Com. Dig. a/c. A. 3. B. 2.

Here it is necessary to note the legal distinction between Bailiff and receiver

12. A Bailiff is an agt a servant who has received property of any kind belonging to another to improve and make profits of for the owner and to account for it. It also enters the discription of a bailiff that he is entitled to a compensation for his reasonable expenses. charges. for whether a salary a commission they are to be deducted from the amount to be paid over This allowance he is entitled to of common right i.e. The law implies a contract to reconvey him &c. Co Lit- 172. A Com Dig. a/c. A. 3. 1 Selw 2. n. 2 Yout 187,8

Action of Account

A Bailiff must not only account for what he has made but for what he might with reasonable care have made, in Acct,

13. A Receiver is called in the Books one who has received money to the use of another, ready to render an account; if I who is to receive no consideration from the other he does not receive it to make profit but only to account for it. A receives the rents of B.'s estate. it is not to use but to pay over. Co. Lit. 172. a. 2. Vent. 187. 8. Com. Dig. a/c A. 4

14. The rule that he is entitled to no allowance, means that the law does not imply a promise to pay any but he may undoubtedly be entitled to it by actual agree!- but as he receives no allowance he is accountable for no profits.

15 Ex. There is an exception as to joint merchants, as between them, the Party sued has an allowance and is accountable for profit, When he receives money for their Use he ought to apply it for their benefit Co Lit 172 a. Com. Dig Tit E a Bac 10. 13. E.

16. On account of these distinctions a bailiff cannot be chargeable as a Receiver, for if he was declared against as such he would lose his allowance, which is a complete objection Cro E. 172. 1 Roll 119. 1 Bac a/c 19.

17. These characters are frequently confounded in practice.

18. This Action being founded on an implied Promise of Contract, does not regularly exist in Cases of Tort —

for then is then no contract to account for the profits
Com. Dig. a/c. D. 8. 9. 11 Co 39. ct. Co Litt 90. 172

19. Then is an exception to this rule when one enters on
Ex. an infants land wrongfully. It takes the profits that
Inf. may at his election bring an action of Trespass or an action of Account in the latter case he treats the wrong doer as his Guardian and describes him as such as he has usurped that character. he is not allowed to defeat the suit by saying that he was a wrong doer 1 Ven. 435. 1 Atk 469. 2 Ven. 395. 342. Com
Ex. dig. a/c. A. 2 Co E. 229. Then is an other exception in Eng. in favour of the King &c

20. It has been determined that when there is three or more partners in trade, the action of account does not lie at law between them but a Bill in Eq. must be brot this is to prevent a multiplicity of the actions 2 Bl. R 269. 2 Day 192.

21. If I before said. an action of account will not lie for a sum certain. if it delivers 10. 100 £ to trade with, it can not have an action of account for the 100 £ but for the profits

I suppose this rule means that for a sum certain he cannot be charged as bailiff but as a receiver for the profits are demanded. here is some confusion which I never could unravel. Com Dig. ct. B. 11 Bac 19. = I think the rule as first laid down is correct, for have high authority that an action of account will lie for a sum certain,

22. If a Sheriff collects a debt on Ex. this is sum certain

if a Receiver can make it. 20, & the Cred. may have an action of account against him but must charge him as a Receiver. Hob. 206.

23. Generally. When one person receives money to the use of another. An action of account will lie to the latter under an account of it to the latter, but when the sum is certain Co Litt 172 a Com. Dig. tit. A. 4. 1 Bac. 20.21. 1 Roll. 116. Kirb 163

24. If money is received by A. to the use of B. to account for &c. &c. he may have an action of account against A. as a Receiver

25. But when money is received by one person to the use of another, the Sheriff must declare of whom the money was received otherwise it will be considered as rec'd of the Sheriff Co Litt. 172. Com Dig tit. A. 4—

26. In these cases indebitatus Assumpsit is concurrent with the action of account and more remedial

27. But if a Bailee of goods pastor destroys them or refuse to render them this action does not lie the Remedy is detinue. Yelv. 4. If a Bailee does not receive goods to make profit upon but to transport them. Com. Dig tit. Debt B. 1 Roll 116. 1 Bac 19

If money is received by A. to the use of B. &c.

28. If a Bailiff hires by appoints an under agent the principal cannot have this action against the sub-bailiff for there is no privity between them. but it will lie by the Bailiff against the sub-bailiff as well as between the Bailiff and principal 1 Roll 118. Com Dig tit. A. 3 & 9—

Account

29. An Exct is not liable in this action. He may be Exec^r but in that case he is regarded in a trustee. for he is not capable of making contracts nor does the Law presume him capable of accounting Com Dig. Act D. Co Litt 172. a. 1 Roll 117.

30. If he who receives the propt of another to account for it, makes an express promise to act this action is one of special assumpsit on the express promise

31. But in special assumpsit he can recover only the special damages sustained by his not accounting but not the property & profits he cannot enter into account Salk 9. Carth 89. Bac Dig 97. Bacon seems to doubt the propriety of this limitation 11 Bac 20

32. But the rule as laid down by Ld Holt, I think must be correct, this act of Spec. Ass^t does not I think lie the act of account - but the Books are not distinct here

33. If one finds another's property he is not liable in this action because the action is founded on a privity which does not exist between the owner and finder. Com. Dig Act. D. Detinue is known if the proper action, for there is no contract express or implied in the finder to account for the property Com Dig Act D.

The Mode of proceeding in Inquiries

34. When the Plff recovers two Judgts are to be rendered, The first is the Judgt quod computet

Account.

i.e. that he shall account. He is to account before auditors appointed by the Court & who form a Court by themselves 1 Vin 99. 1 Mod 42, Com Dig tit. C. 15. Then Pud. is "quod computet," being rendered the auditors are to meet at a certain time and place the deft is then obliged to meet and then he is account of which every item is open for dispute & proof & on the P's. They return their "report" to the "answer" to the Court and the Court renders Pud. "quod recomputet" as it would be on a verdict at Law 3 Bl. 164. 11 Co 40 1 Salk. 74. 9.

35. On the issue to be first tried before the Jury, "quod computet" the point to be settled is when the Deft is bound to settle the account

36. On the second issue to ascertain the amount if any which is due the Pltf. In Com. if a balance is found for the Defts Judgt "quod recomputet" &c. may be given for him by Stat. (This can only be done in Eq. but by C.L. & Equity)

37. In connection before the auditors both parties are by Com. right allowed (by Stat allowed) to testify and can be compelled under pain of Imprisonment by the auditors I do not know whether the auditors have not power in Eq. In Eq. as well as Com. if the party refuses to appear & render an account before the auditors the auditors then & the Court in Eq. may give Judgt for the whole demand against him. Com Dig tit. C. 15. Ord C. 806. 3 Bl. 117.

The action of Acct is more remedial now than at law in Equity and better more so.

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38. The principal of the action of account has been neglected in Eng. on account of the intervention of Equity

Pleadings in account.

39. It is common for the Deft to plead to the action i.e. to defend the recovery of Judgment "quod computet" by pleading any thing that shews that he is not bound to account that he was never bailiff &c action is gone. this is the Gen. issue, com. Dig c/e E.4. 1 Roll 121. 1 Bac. 26.

40. A release of all actions &c this par. action is a good plea in Bar, for it shows that he is not obliged to account 1 Roll 123 1 Bac. 26

41. An award of arbitrators that the Defr shall be acquitted & discharged in the action is a good bar. It operates as a decree of Chy awarding a release Go. C. 82. 4 Bac 85.

42. But any plea in bar by which the object is to shew that the Defr does not owe the Pltf. & that on account he would owe him nothing is bad. The question is whether he is bound to account and, whether there is a balance against him. Hence a plea that the Defr received the money merely to hand over and that he did hand it over is good plea in bar. for it shews that was no contract to act. and that the defr was merely a bailee com. Dig Pe. E. 5. Co. 30. 3 Rol. 114. 55

43. This plea all goes to shew that the Defr is not legally obliged to account. any plea not tending to this is bad

Hence a special plea in bar that the Defr has paid the

Account.

the money a part paid the debt is not good. for it admits that he was bound to account: but does not aver that he has accounted: this Plea good however before Auditors 1 Roll 123. 4. 1 Bac 20

43. A Plea that the Deft has fully accounted is a good plea in bar for it is a plea that he has performed his Contract express or implied to account Lin Dig 45 E 3 Hen 113

But this question doth not if he pleads "fully accounted" how can the same be tried without the Jurys examining the accounts which they cannot do

The Practice is, the Deft must prove that he has rendred some account & if the Plf cannot prove it, plea is true if he has rendered no account the Judg! "good computet" will be refused

45. But on the other hand any defence which admits that the Defts was once liable is good, except that of "fully accounted" & release" which is equivalent to a release. 3 Wils 73. 113. 4.

46 Thus in this three good special pleas in Bar. 1st Non Baillie 2d fully accounted 3d a release or something equivalent.

The reason will be given upon the circumstances, that if the Deft has been once bound to account & has not been discharged & has not accounted, he is still bound to account that he may not be subjected

47. in penal Judg! The above pleas must be specially pleaded & cannot be given in evidence under the gen issue

48. When the Cas comes before the Auditors the parties may file a petition & plead or demur

Account

49. If an issue in Law is joined the question must be taken back to the Court.

50. It is laid down indeed that a question of fact must be taken back to the Court Common Pleas. Petty Comb. Account 6. 11. 3 Mod 99. Com Dig. 14. 806

But I think the meaning of the rule as to Issues in fact is that when a special issue is joined it must be taken

51. back. It is another rule that whatever can be pleaded in bar before the Ct. must be so pleaded, and Cannot be pleaded before the Auditors Co 6 32. 116. 11 Mod. 7.3. 101. 13. 1 Leon, 219.

This principle is common to all proceedings i.e. that matter which could have been pleaded in a previous stage cannot be subsequently pleaded.

52. Nothing can be pleaded before the Auditors which has been pleaded in Court, and found. For it would go to contradict the record and the Jury's "quod computet". Hence neither of the above special pleas in Bar can be pleaded before the Auditors, 3 Mod 113. 2 Day 116, Co 6. 32.

53. On the other hand it is a good accounting & discharge of the Def't before the Auditors that any fact or sum which could not have been pleaded in bar but which shows that he ought not to be Constantly Subjected to an action against a Factor it is a good plea that the property was lost at sea before the Auditors but not before the Court in bar. Com Dig. Acct I 11 1 Mod. 124. 2 Sid 91. 11. 12

54. And if it is a good plea before the Auditors that the [illegible]

were taken to robbers of public enemies. Hist. Acct. by accounting for the goods &c to Mich. & Co. Lect. 89. Com. Dig. Acc. E. 11. 2 Stra. 680.

55. Pi not a good pr. ... that the property in the Principal lands were forfeited & being in danger of decay was sold by him to defendant as creditt. who became insolvent. Held not a good plea, unless his Commission authorizing him to sell on credit. But this must be specially relayed. Lit. Mod. Lect. Leases.

56. The Def. an accounting is allowed for all loss by mistake accident &c. not a wilful Spending beyond his power to prejudice a witness his favour

57. He is also allowed by the Creditors reasonable expenses & charges for managing the property. Com. Dig. Ch. 6 12 & Lect. 89.

58. But no such allowance is made where in case of a Bankrupt but comes (as being) in an Injunct. 1 Vern. 219. Com. Dig. Pl. 3 Pl. is not to be allowed against the King a no Def. is not. Com. Dig. Ch. E 11

59. When the account is taken & the monies made to the Chief Judge is awarded as on a verdict.

60. The fees and expences become part of the bill of Cost in Court but in the Prerogative are regularly denied by the Pltf. I do not know the English Law in this point

61. Where upon Comm. the acc. dot exhibit it may be but before a single minister of the Law he must bring both parties i.e. he must take the whole account

62. When monies in any hands are awarded upon accounting

Account.

accounts it is usual to state the Matters to appear before to state the accounts in the nature of Articles

63. If a wilful remedy against the Bailiff is by Law only a Debt in the Hands of, At Law this is to be proved, whereby the Debt cannot be compelled to be paid by Law, 3 Mod. 437, 1 Sal. 449. 1 Vern 228.

But in Equity the Auditors have all the Equitable powers of a Court of Equity

64. An award of Arbitrators may be set aside for Fraud as a Verdict may be. There is little in this case, but Judges

65. If the Auditors exceed their Commission & make a mistake in their own Principle the award may be set aside. so for any misbehaviour or Corruption among the Auditors 1 Vent-268. 413.

66. But the Court will not enquire into the facts, on the award of Arbitrators Rep. 353. 1 Rol. 137. 261. 8. 2 Day 116.

67. If it is alleged that the Auditors have made a mistake, the Court will enquire into it from the Auditors themselves, and from no other persons.

68. These rules as to setting aside an award apply to the Master Comm

End of Account

Replevin.

Replevin

1. Replevin has been defined to be a delivery to the owner of the goods by legal process the thing or things destrained on security given by him to try the right and redeliver the distress if judgt be against him 1 Sun 145. 4 Bac Dig 345. 4 Bac. 372.
2. This redelivery is effected by the action or writ of replevin. By this definition replevin is confined to cases of distress but it extends to other cases. as will appear.
3. A distress is the taking of a chattel out of the hands of a wrong-doer. and giving it into the custody of the party injured as security given as a pledge for the satisfaction of his claim.
4. A distress is always the private act of the person injured and not the act of the Law.
5. The word distress is used in two senses. meaning the act of taking or the thing taken
6. By the word "wrongdoer" is here not only meant a tort-feasor but also persons guilty of default. or not discharging a duty
7. According to this definition replevin will not lie for the recovery of goods taken by a mere Trespasser Bul. 53. 6 T.R. 522 3 Bl.R. 146. Stra 1184. 1 Wils 672. If this is true replevin will not lie for any taking of goods which is not in the nature of a distress. however by other opinions this writ will lie for any tortious taking of another goods and appears very reasonable that it should and it has been so decided in N. York Dis E. 834. Com Dig. Repl. H. Bull. 53. 7. John. 140.

If these opinions are law and I am strongly of opinion that they are law. Replevin will lie for any wrongful taking whatever and for any kind of goods. It is very desirable that such should be the rule for to goods often times are

Replevin.

value is attached. for which damages would be no compensation.

8. The writ cannot be granted to the Plff but upon his giving security as pledge 1st. To try whether the distrainer had a right to make the distress. 2dly. To redeliver the goods if the distrainer on the trial as to his right obtains judg.t 3 Bl Ab. 13. 14. Esh. Dig. 347.-8.

9. In Comm. the security given by the Plff in replevin is an actual substitute for the property. So that in no case can the good be returned to the distrainer. but the pledge of the Plff is recovered in damages only, if the distrainer establishes his right to distrain.

10. If the Plff does not prosecute & try his right or if he fails in this action the property must be returned and this is done by a writ. "retorno de habendo". He may keep the goods until he is satisfied for his debt and then must restore them to the owner 1 Inst 145. 3 Bl Ab. 14. 158. 8 Co 47. a.

11. If sufficient amends had been tendered to the distrainer previous to the distress the sub-distress would be tortious

12. If after the distress but before the property was impounded amends are tendered the sub-detention is tortious.

13. If after Judg.t in favour of a distrainer amends are tendered the sub-detention of the goods is unlawful and will subject the distrainer to trover or detinue. 8 Co 147. a. Bul 60. Esp. Dig 357. 5. Co. 76. a.

14. When the goods are delivered to the dept. they are to be kept as a pledge.

15. When goods &c. are distrained the must be impounded 1 Inst. 47. 3 Bl Ab. 12. for a private individual is not allowed to keep them. If they are goods they must be impounded in a pound Covert. If Cattle in a pound overt. These pounds are legal depots established by law. and when impounded in

such places they are regarded as in the custody of the law. At Com. Law. a distress being in the nature of a pledge could not be sold and if the owner should prove obstinate and refused to pay the detainers claim. the goods must be kept. 3 Blk. 10. 13. 1 Bac. 358.

16. As this produced great inconvenience Stats were made authorizing the distrainer to sell the goods particularly in the case of rent, Cattle however taken damage feasant are not allowed to be sold 3 Blk. 13. 8 Co 41. 12 Mod 330.

17. This writ is demandable of common right 1 Inst. 145. 4 Bac. 373.

18. The principal cases in which distress may be made at Com. Law. are those of taking Cattle damage feasant. and for rent arrears. 3 Blk. 5. 7. Esp Dig 364. & 304. 353. 1 Ins 46.

19. There are other cases in which a distress might be made but with these we have little to do.

20. By the Eng. Law. a writ of replevin may be obtained out of Chancery and now by Stat of Marlbridge by plaint to a Sheriff he may order a bailiff to replevy goods distrained without a written precept. Esp Dig 343-7. Fitzh. 167.

21. This writ lies in Eng. in all cases in which a distress can be taken except in cases of a distress and capias.

22 In this State Replevin lies in all cases where goods & chattels are impounded distrained & attached on mesne process.

23. By the Com. Law. the Defts goods cannot be attached on mesne process.

24. Replevin lies first, to restore cattle, to the owner, taken damage feasant. in this case the party trespassed on has his election either to bring trespass & to detain and impound the cattle but he cannot do both and should he distrain and thro his own fault the cattle escape he loses his remedy and if they die by his fault & negligence. he not only loses the

remedy but is liable to the owner of them to their value. But if they should escape & die without his negligence he will have trespass.

25. At Com Law, the proceedings were circuitous and difficult. But by Stat of Marlbridge (which is prima facie Law here) the Sheriff is enabled to grant a writ of replevin on complaint. 3 Blk. 147. Fitz. N. 68–9.

26. If then the Plff fails to prosecute his action, these pledges are forfeited to the owner. And so also if the Plff does prosecute but fails the defts may have Sci-fa. against the Plages & Robn 322, Esp. Dig 347. 2 Skin 41. Fitz 172.

27. There is a strong analogy between taking the body of a debtor & distraining his goods for the taking in both cases is to compel the payment of a debt, and in both cases while the pledge is retained the creditor has no other remedy. 12. Mod 663. 2 Bac. 354. 179.

28. In Com. the owner may not only have his goods replevyed but he must after receiving notice of them being distrained either redeem them by paying the demand of the distrainor & replevy them if he does neither he will be liable to a daily fine after the elapse of 24 hours, so long as he refuses.

29. And by the Com. Law. the owner must provide sustenance for the cattle if impounded in a pound overt and if in a pound covert it is the duty of the distrainor to feed them 1 Just. 47. 3. Blk. 13. for the distrainer is supposed not to have access to a pound covert.

30. At Com Law. if the Deft in Replevin succeeded he might have judgt de retorno habendo. This mode however was found very inconvenient for in such cases all he can do is to keep the goods untill all damages are satisfied 1 Just. 145 3 Bac 372 – 3, 382.

Replevin.

31. The Writ of Replevin for cattle distrained damage feasant contains in form a declaration of Trespass. Yet generally in Replevin the Plff goes not for the recovery of damages but to try the right of the dest to make the distress. If however the act of distraining was in itself unlawful the Plff does go for damages

When beasts are impounded the pound keeper has a lien upon them until the pounding fees are paid. notwithstanding the demand may have been satisfied. this is similar to a gaolers lien on his prisoners

Commonable beasts Fences &c.

1. Generally where beasts enter upon one's land through the insufficiency of his fences, he has no legal claim for damages in any form, for it happened thro' his own fault in the eye law bound to keep a good and sufficient fence. But if only a part of his fence is down or bad & the beasts break thro the good part he will be entitled to damages 2 H 6 13 5-27

2. This Rule admits of many exceptions thro, the existence of local customs which make certain beasts commonable & permits them to run at large on the highway. then the fences must be good, but if they are not commonable by being prohibited to run at large & they enter from the highway it makes no matter whatever whether the fence is sufficient or not. for they have no right to run at large 2 Hen Blk 5-27.

3. In this State there is an act of the legislature authorizing the different Towns to say what are Commonable Cattle. It is a general opinion that neat cattle and sheep have a right

to run at large upon the highways but I doubt whether there is any such rule. As to swine and horses no one contends their right to be at large, if therefore they enter upon ans[wer]s land, there being no fence they may be distrained

4. With regard to animals committing damage common to their species, the owner is liable, whether he knows or not that his animals had previously committed a like damage, thus if one keeps a fox and it kills his neighbors fowls, he will be liable tho, he may have known him never to have done so before, so also if animals eating herbage for he must have known that such was the disposition of the animal and if a furious beast is in the habit of escaping and doing mischief the owner will be held liable for the damages he may commit

5. On the other hand, for mischief committed by ones animals which is not common to it without the owners previous knowledge, he is not liable, this principle is not transferable, 4 Co 13. Cro Car 350. 1 Roll 21. Sh. Abr. 59, 13. Johns. 339.

6. He who has distrained the goods of another, has no right to use them, for he distrains under the form of law, and if he uses them he becomes a trespasser ab initio. 3 Blk. 13, Cro Jac 148.

7. As title to land may come in question in this action it is well to state that it has been a real action tho, now it is wholly and entirely personal for as land cannot be recovered in it it ought not to be called a real action 4 Bac 373. Comb 470. 472. 2 Ld.

Method of making a distress

1. It is a rule that distress must be made in the day time except Cattle taken damage feasant, the object is to guard against abuse under this privilege 3 Blk. 11. Esp. Dig 360. 1 Inst. 142. 161

2. A distress of cattle damage feasant must be made while the cattle are on the land 1 Inst. 142 Esp. Dig 360. 4 Co. 22.

3. This rule was formerly the same in distress for rent arrears 3 Blk. 11. & Landlord might formerly take as large a distress as he pleased and the tenant had no remedy this being oppressive. the Stat of Marlbridge prohibits the taking of pleas for bail and in this case the tenant may have an action on the case against the Landlord, and this will be true when there was no subsequent injury to the property and even also if the property was returned immediately. Indeed it was once a question whether Trespass would not lie for excessive distress but it is now settled that it will not unless the articles on which the excessive distress is levied be sold &c. for their value is known being settled by Law. 1 Bur 590.

4. Distress for Rent is incident of Common right by implication of law, to those cases only where the party has the reversionary right of interest unless the right is created by express compact, he may indeed have an action for the rent but he cannot distrain for it Co. Lec. 215-18. 1 Co Litt 142-3, 3 Blk. 42. Esp. Dig 355. 355.

5. This is an artificial distress and I know no reason for it, the Stat. of Geo. 2 gives a distress for all kinds of rent. 2 Blk 43. 3 Blk 6. Esp. Dig 356. But this is a late Stat and the com Law governs us unless created otherwise by our own State laws.
In some cases the rule which prevails here is adopted in Eng. viz. If the Deft. prevails he has his costs and damages instead of having his writ "retorno de habendo" and the rule is thus

if the distress is less in amount than the rent. he can recover only for the amt of the distress. if more. he can recover only to the amount of the rent. 3 Blk 150. But 503 T.R. 349. H. Blk 46. If he does not get the whole amount of his rent. he may distrain again and proceed by action. This is the only action in which he recovers "quod recuperet".

6. In Court the writ of replevin is allowed in case of attachment on mesne process. but this kind of attachment is unknown to the common Law. Kilk 274. The reason is that as the goods are taken as security for the event of the suit and as perhaps the decision may be distant. it is probably just that the defd may have his goods replevyed on giving a security which shall be a pledge in stead of the goods 2 Shep Abs. 93.

The Writ in Court

7. When this writ is brought it is not necessary to charge the defd with trespass unless the taking was actually tortious.

8. The writ must be directed to the same Officer, who seized the goods & secured the attachment, and he must return the writ into Court.

9. In Modern Practice. Replevying goods has been superceded by the practice of accepting an Attachment. this the Sheriff may refuse & allege the insufficiency of the security.

10. The Magistrate in taking bonds acts ministerially as the Sheriff in Eng. and if he takes insufficient security he is liable in an action on the case. the Sheriff in Eng. and the Magistrate here is liable for the whole amount of the debt in Replevin 3 T.R 68. 1 Hen Blk. 96. Comp. 11. 2 Hen. Blk 594. 4 T.R. 433. Esp Dig 343.

11. It has been a question, whether the defd in the attachment could have & give bonds But it is now settled that he cannot. the suit in such case must abate and the Magistrate is held liable. 1 Rob. 165.

12. It has been determined in this State that if the property of B. is attached by mistake for A. Replevin will not lie and Trespass is the only remedy Hard 276. for it is said A cannot reply because the goods do not belong to him. B cannot be sued he is no party to the suit. however according to the late opinions he can.

13. If the chattels of a feme sole are distrained and she marries her husband must replevy in his own name. there has been much debate, whether, or neither the wife must not join. Bul 53. Esp Dig 376. 1 Sid 812. But there is no necessity of joining her for the action of the property is not altered it being only in pledge. Even the feme sole had the conviction before married that it become the husbands. But should she join the defect would be cured by verdict. for the law will presume them to be joint tenants.

14. One's Representatives may have this writ. for on his death the property vest in the representative Bul N.P. 53 Esp. Dig 372. 1 Sid 81-2.

15. If the goods of several are distrained by the same act and at the same time. they cannot join in this writ for the injuries as well as the titles are several 1 Just 145-6. Esp. Dig. 374. Bul N.P. 53.

16. Goods distrained in a foreign country and brot. here cannot be replevied here in this Country. 2 Show. 91. Esp Dig 372. The reason assigned is the distress tho illegal may have been legal when it was made and its legality cannot be enquired into. But I think the better reason to be that the cause of action in which distress is allowed are local.

17. This writ lies for things personal only 4 Bac 383. Gilb. H. 68. Esp. Dig 372.

It has been said that replevin will not lie for title deeds to-

lands, and if the rule that replevin will only lie for or in cases of distress then it will not lie for these. But if it will lie for any tortious taking whatever, it will lie in this case. And it is also settled that title does not prevail to chattels & that replevin of trover will lie for them.

18. Replevin is said to be founded on property in the Plff. hence it is distinguished from trespass which is founded on poss[n]. How it is a good plea in bar to replevin that the poss belongs to another. 2 Lev. 92. Carth. 74. 243. Salk. 94 Esp Dig 351. But this would be no plea in an action of trespass

Pleadings in Replevin

Declaration.

1. The Plaintiff complains of the taking and detaining the goods &c. & damage &demands satisfaction, Com. Dig. Plea 3 B. 6. 10. 2 Chit. Plea. 304. 2 Saund 174. a. 310.

2. The Deft may deny or confess the taking, or he may confess and justify the taking, as that they were taken for rent arrear. or cattle damage feasant, 4 Bac 388.

3. But to all claims founding in tort the Gen. Plea, & the avowry which is called a replication is in form "The avowant claims damages only: in Dig he prays a return of the goods or cattle.

4. The Gen issue is "non cepit" i.e. that the Deft. did not take the cattle in manner and form as alleged. But under this issue the Deft cannot shew a claim of property in the goods, because it is inconsistent with the import of the gen issue such defence therefore must be pleaded specially, 1 Vent. 249, Bul NP 54. Salk. 5. 2 Lev. 92. 6 Mod 81.

5. If the Deft justifies in his own right or that of his wife, he is called the avowant, and his plea called the avowry.

6. But if in another right be paid to make cognizance

2 Saund 195, Esp

Dig 360

7. An avowry is in the nature of a declaration in several particulars 1st that if he prevails have a right to [illegible] quod recuperet as the other Plff. has if he prevails 2d. the Plff in the [illegible] may plead in abatement to the avowry 3d An avowant is not bound to conclude his avowry with a verification as he who pleads a special plea in abatement. 2 Wils 117. Salk. 95. Esp. 376-7. Lev E 530. 795. Carth. 102-5 Mod 103, Yelv. 148. It follows then that where there is an avowry & cognizance made both parties are actors. & Plff and if the defd succeeds he is entitled to a judgt quod recuperet & one de retorno habendo, 2 Mod. 149. 298. 2 Bul N.P. 61. 3 Blk. 150-1.

8. Tho. an avowry is in the nature of a declaration. It has been said that one of two & more co tenants may avow with joining his co tenants but this opinion seems to be overruled and he must avow in his own name and for his co-tenants as bailiff Lev E 330, 1 Rol a Bac Ab. 120-, 2 H. Blk. 226. Esp Dig 374.

9. Tenants in common may have several avowries for [illegible] tho for cattle taken damage feasant they cannot. Carth. 340. Salk. 389, Ld Ray 422. The reason is rent arises from the lands and therefore the titles of the co-tenants come in question and their titles are several. tho their possession is joint.

End of Replevin

Usury.

Usury

1. Usury is defined to be "the taking of a contracting for unlaw. interest" for the forbearance of the principal of a loan, Forbearance is called the delay of payment of the interest contracted for 2 Blk. 454.
2. The Interest is the premium which the borrower pays for the use of the thing borrowed to the debtor. Lowp 113-15. 1 East 195. 28-9-
3. The taking of or contracting for an excessive premium may apply to three things viz. money 1 Atk 351. 3 Y.R. 501. Comp. 111. 4 T.R. Doug. 108. 2 Y.R. 238. Ord on Usury 7. Appendix.
4. The Stat of Com. includes not only money but wares, merchandize and every commodity, whatever Stat. 476.
5. A Contract in gen. cannot be usurious unless the specific articles are received instead of money or to be converted into money.
6. At one period in the Eng Law the taking of any interest was usurious. 3 Y Interest was first settled by Stat Anne 37. H. 3. 12. Ch. 6. Coke 4. 2 Blk. 454-5. 2 Roll 801. Ord 11. 12. 31.
7. What was called usury at Com Law was an indictable offence Dalton 292. Ord. 7. 8. The lawful Int. of Eng. is now 5 pr Cent.

Usury

and any contract reserving more is usurious. 1 Atk 340. 2 Ves

8. 142. By a modern Stat nothing can be the subject of usury but a loan, but a debt is presumed to be a loan. 1 East 195. a.

9. Forbearance, as the term is used in the Stat. is the consideration & the principle

10. In Pleading Usury the usual words are that "the contract is corrupt" 1 Leon. 90 & 96. Cro. 23.

11. It is essential to an usurious contract that the thing lent is to be returned at all events Hence if a thing lent is bona-fide put at hazard, the reservation of more than usual interest is not usurious 2 Blk. 438, 1 Lev. 54. 1 & 8 Atk. 341. 3 Shep. 390. 1 Ab 286. 4 Yk. 356.

12. But a hazard consequential or incidental is not contemplated by the rule. for of this kind is the hazard that the borrower may be a bankrupt, go to being it with in the rule. the hazard must be an essential ingredient in the contract. 2 Ves. 172. Cro 24. 47.

13. The loans contemplated by Stat are not those which require that the thing loaned should be specifically returned as in bailment, Cro 26.

14. In all cases where there is a bailment and the specific article is to be returned and a price paid for the use of it there can be no usury.

15. Loans then within the Stat. are those only in which the thing lent is to be returned by a premium in general but not specifically returned

16. It is not essential for usury that an agreement for illegal interest be made at the time of borrowing or making the contract, for a subsequent one on a debt due, if more than legal interest may make it usurious 6 Mod 303. 12 Ab 386. Cro 30. 4 Bro. Chancery 30. 2 Wm Blackstone, 404. — (a)

For a debt implies a loan, and a further forbearance is in effect a loan of the same sum of money. The rate of Int. generally in the U.S. is 6 pr Cent.

17. If foreign Int accrued is turned into principal it will draw the Int allowed in the State where it was secured 1 Bl Rep. 268, Doc 356. Compound Interest.

18. A contract reserving compound Interest is not unusual for that reason. But Ct of Law will enforce it only as simple interest, 2 Atk. 331. Pow Mort. 441. 4 T R 613, to 16. 2 H Blk. 144. 10 Mod 653. But if compound interest is actually paid it cannot be recovered back, for it is legal and the payer cannot recover it.

19. As to an agreement to pay interest on interest, vide 2 Atk 331. Pow M. 441, 4 T R. 613, to 16 10 Mod 652, Pr Chan 161, Salk 449. 2 Vent. 134 or 34. As the qualification from Pow. & Atk. is incident,

20. whenever Judgt is rendered for principle and interest it all becomes principle and will draw int. 10 Mod 478. 480. 453. Pr Chan 500. 2 Eq. Ca 530. 8 Atk 722.

21. If compound Interest is reserved as a penalty to enforce the payt of simple Interest Equity will enforce it, not but relieve upon the penalty. Salk 449 Pow M. 424. 2 Vent 316. 259. 8 Atk 520. 3 Blk 432, Doc 87.

22. No Contract is usurious unless the intention of the parties, is as to reserve a higher rate than is allowed by Law. Hence if a reference should by mistake put the interest too high contrary to the intention of the parties, if that fact could be proved it would not be usurious. Cro E. 543. Cro Jac 577. 508. 2 Blk. R. 865, 3 Bac Ab 444. 454. Cro C. 501.

23. Why a corrupt contract or agreement is meant, not merely that the parties intend to violate the law, not in fact is it necessary they should know what the law is. Le Ju. 577. Doc 60-1.

But a mistake in point of Law may not make it usurious, if done by a Stranger.

24. When the principal is by the terms of the contract actually and bona fide lent on hazard the Contract cannot be usurious however high the premium may have been. By Hazard is meant "that in a certain event, the principal would be lost." Cro E. 741. It is for this reason that Marine interest is not usurious, Marl on Ins. 632–35. 2 Bl Rp 453. Cro Jac 208. 508. Bac Ab 12. 2 Ves. 154.

25. What are called post obits are not usurious, By a post obit is meant an agreement by a Borrower to pay a much larger sum on the death of some particular individual provided some incident shall happen in the interim or at that time 2 Ves 125. 1 Atk 130 or 351. 3 Ves 27. 53. Bac Ab 39.

26. Post obits may be set aside in Chancery on account of their being unconscionable 2 Ves 125. 1 Atk. 301. 3 Atk 304. 1 Atk 341. Bac Ab 43.

27. And by reason of the Fluctuation of the price of stocks an agreement to transfer so much stock at a future time as the Amount of the debt will purchase at the time the agreement was made is not usurious even tho the Stocks may have advanced even so much, 8 East 304. 5 Esp 104. 1 Ves Jr 52, 4 Bloom Ch. 38. 3 J Rp 531.

28. If money is lent and instead of paying interest to the lender the agreement is that he should share the profits of the trade of the borrower, it is not usurious tho the profits of the trade exceed the interest of the money lent. 2 Bac 891. 2 Ves. Jr 248. Bac Ab 47. But if the contract is to share the gain without the loss the borrower it is said it will be usurious. But I cannot see how it can be usurious. 4 T R. 353. Bac Ab 47.

29. If a certain gain is to accrue to the lender, exceeding the legal interest, it will be usurious. and even tho, the principal

any thing due except money See 6. 20. Ord 47-8.

3. If the borrower or debtor has it in his power by the terms of the contract to avoid the payment of this excess of interest it cannot be usurious, for if so every penal bond would be usurious 3 Les 69. 6. Lowp 112, 795-6. Cro 509. 2 Yk. 52. 3 ib 531. 1 H. 154 227. 1 Atk 342. 351 —

3. If it is a prevalent custom for traders to sells as follows viz. 1 Cwt. of sugar for $12. if not paid in 60 days it shall be $14. this contingent excess is not usurious But it would be otherwise if the contingent excess of legal Int. depended upon the will of the Creditor it would be otherwise. 1 Ves 255. Cro 51. 2. Lowp 112, Ord 57-8. 4 Ves Jr. 678.

3. The reservation of Legal Interest is not usurious tho made payable semiannually quarterly monthly a even daily Ves J. 26. Ex Cas 283.

The above notes were copied from a part of a Title of Gould's so that the Title is as yet unfinished.





Notes to Replevin,

(a) Sec. 16. p. 61. But to make a contract void there must a corrupt agreem.t at the time of making it. Swf. Dig. 3:2.320. for if the contract was valid at the time of making it it cannot be rendered invalid by matter ex post facto.


Assumpsit

Assumpsit

1. This is the most important action in Law.
2. It is an action of Trespass on the case brought to recover damages for the breach of a simple contract express or implied —
3. In the form of pleading the demand always sounds in damages and not in debt 3 Bl Ch 158 1 Selw 52 56
4. This action is derived from the Statute of Westminster 2d —
5. Debt, Cov[enant] Broken, and account — and detinue are the only actions on Contract as known to the Common Law 3 Reeves His Eng[lish] Law 158 and compare 2 Ibid 202 — 3 243 89 341
6. Our prime Lawyers in common parlance observe a distinction between actions on the case and actions of Trespass on the case, the latter tending in tort this distinction is not known to the Law however — This action lies for the Breach of a simple contract — All contracts not under seal though formally written are but written & parol contracts such writing according to the theory of Law is not the contract itself but only evidence of a parol contract. It is at Com[mon] Law not an Instrument On an Instrument an action may be founded there is an exception in the Law of Merchants — Bill of Ex and Notes are the foundation of actions 1 Selw 53 — 1 Pow 131 2 Cunn 245 11 Mass 27 1 Esp. Dig or Esp. 16 — 219 n.
8. This action never lies on a specialty. The remedy upon a deed is either debt or Covenant broken. Others are called higher remedies because adapted to recover on a contract of a higher nature Ch. Ele 491 187 605 Esp Dig 148
9. The contr[act] upon which this action may be brought may be

Assumpsit

either express or implied. In the latter case where the promise is a mere fiction, the Prom[s] must be implied from some debt or duty and must be alleged as the consideration though in fact it is the sole consideration 1 Ld Ray 1 1 Salk 53.

"But though the law will imply a promise from an indebtedness and actual consideration yet a consideration cannot be implied from a promise." Hence no action will lie on an express promise even in writing without actual consideration. 2 Johns 237-8. 5 T Rep. 582. 1 Salk 23.

10. When an action is brought on an implied promise it is called an implied or "Indebitus Assumpsit" from the Latin term. The action is essentially of the nature of the action of Debt for the debt is stated as the consideration of the promise. The recovery tho in the nature of damages is specially of debt Esp Dig 1.

11. What the promise tho implied must generally be alledged in express and on the face of the record it is impossible for the Court to know whether the promise be express or implied if promise alleged on the face of the declaration is an express promise.

12. If in such case the Pff should bring an action on the implied promise and the Deft demurs to it or in a later stage moves in arrest of Judgt the Court will presume an express promise and if there is any Law requiring the promise to be in writing the Court will intend that the promise is accordingly in writing.

It is usual and safer to demur to a declaration when it does not allege facts sufficient to support an implied promise.

Then in pleading no such thing as an implied promise,

Assumpsit.

Comyns. 289. 7 T Rep 351. n. 6 Mod 131. 2 Wil Mut Lain 220.

3. Assumpsit is an equitable action founded on the equitable construction of Stat. Westm. 2, c.

Hence it follows in all cases that it generally will lie where the defendant is bound "ex aequo et bono" in principles & natural justice either to refund the money received to the Pff or to pay money where the Pff has a right to demand it. 2 Burr. 1010. 3 Wo 1895. Esp Dig 1. 2 T Rep 370. Comyns. 116. 7 Pp. 7.

14. The consequence of this principle is, that any defence which would be valid in Eq, would be a good defence of the same claim at Law.

Hence where it is not against good conscience for a deft. to retain the money for which he is sued or to refuse payment of the money demanded he is not liable 2 Burr. 1357 2 Bl. Rep. 834

These Rules in their full extent, hold even in indebitatus Assumpsit.

15. A man may bind himself by express promise to do what is unreasonable for him to do and inequitable, but the Law in such case will imply no obligation

As a consequence of these Equitable rules I remark that he who has paid a just debt or a debt of honour which he could not be compelled to pay cannot recover it back so if one has paid a just debt, which was barred by Stat of Limitations,

Indebitatus Assumpsit.

6. Will lie to recover back money paid by mistake, as owes B. money by mistake pays him 50 for 40. action of Ind. Assumpsit lies.

Assumpsit

Wch it not for this action he must have recourse to Equity. Cas. 50 51 - 1 New Rep 285 Doug. 637. 37 " 5 Burr 1984. 2039 4 Rep 553 or 533 - The ground of this action is that the deft cannot retain in conscience the money"

1. If the action lies in cases of mistake & forfeit it will lie where he obtains the money by fraud Stran. 915 Doug 671 Coups. 182 " 793. 2 Burr 1005 - 1 Rep 485

8. If money is paid to a wrong person it may be recovered A pays money to B. supposing him to be C and he supposing himself to be the Ex? of C. tho' sums the will is forged and he is not Ex? the money may be recovered in this action though in these cases there is no need of stating fraud -

9. If money is paid by an Insurer for a supposed loss at Sea But the Ship returns, in case the money may be recd. 2 Burr 1010 Esp Dig 2.

20. If an underwriter has paid a loss, Not knowing that a warranty has been broken by the insured (in which case he is not liable) the insurer may recover it, whether the Insured knew of the breach or not - 1 T.R. 343 Esp Dig 2 -

21. If one pays money with a belief that he is under an obligation to pay it - when he is not - as paying money to a Bankt not knowing the Bankruptcy he may in such case recover it Bac Ab -

The mistake contemplated in these cases are matters of fact and not of Law for "ignorantia Juris " excuses noone "

1 T Rep. 285 " 112. Doug " 637 " 3 Mals 74 Esp Dig 2

That a claim must be founded in ignorance of Law vide 3 East 409 Stra 1245 Doug 451 - 657. 2 T Rep 713 "

Assumpsit.

22. If a man marries having a wife alive, another woman and under pretence of being single so to defraud another woman & receives money from the wife de facto it may be recovered in Indebt. on the ground of fraud 1 Salk 28 Esp Dig 2.

23. Money which was voluntarily paid under a rule of Ct. without Judgt. even can be recovered, as having been paid by mistake though it is afterwards discovered there was one, for to permit a recovery would be an impeachment of the record., 2 T Rep 648 Esp Dig 2,
The parties remedy is to apply to the Court who granted it to rectify it.

24. If money has been paid by a bona fide executor of a Bill of Ex. forged, to a bona fide holder for a valuable Consid^n it cannot be recovered back 2 Bur 1354. Esp Dig 2 N.P. Ca 513
This rule obtains only in cases of a bona fide holder

25. If one voluntarily pays money, which by law he is not bound to pay, with a full knowledge of the facts which shew he is not bound, & the means of such knowledge are before him, in such case he cannot recover it.

26. If an Underwriter knowing that the warranty has been broken, pays the loss he cannot recover it Esp. Dig 2. N.P. Ca 5 Ibid 198 & 102 2 East 469 1 B & P 260 2 Blk R 824. 1 T Rep 65. 4 Esp. 221. 2 Ibid 723
This is not intended to comprehend illegal contracts or money paid upon them, for in many cases they may be recovered that is, money paid upon them.

27. When the party sued pays the demand, protesting that he is not bound to pay it, and declaring that this payment shall not prejudice his rights of contesting it, he cannot recover it back again on the ground that he thus objected, for if there was a good defence he should have availed himself of it.

Assumpsit

he would have depended in proper time - and indeed the case is treated as if he had paid it on Judgt. 1 Esp Cas & Rep. 274 - 84 - 2 ibid 546 Esp Dig 6. Ned

28. As to payments made by mistake & otherwise improperly made to Agt there is much confusion in the Books which arises from the general manner of laying down the Rules.

29. If an Agt obtains money tortiously under colour of authority from and in the name of his Principal but actualy for himself he is liable to refund it as money had and received and this even tho he pays it over to the principal, for in fact he acts in his own individual capacity and receives the money thro his own wrong.

30. If an Agt in stating an account of his principal makes a larger balance than is due, (that he may keep the surplus) he is liable for it though he afterwards pays it over. He is not discharged for he commits a wrongful tort - there is a complete right of Act against - in the moment payment is made but no subsequent act can discharge without no subsequent act of his own - Comp 182 - 204 Loft 655 - 4 T R 185 3 Esp Rep. 231 - Esp Dig. 5 & 17 -

31. If the an Agent by a wilful wrong obtains money actualy for the Pff. the rule is the same, for in committing a wilful wrong, he may always be treated as acting on his own responsibility.
2 - Ev 256 3 Esp R 231 Esp Dig 17 & 26 - 3 -

Assumpsit.

32. If an Agent receives money bona fide for his principal but without right — as by mistake &c. he is liable, provided he is not a known agent and has not paid it over to his principal, this means that the principal was not known.

33. An Agent employed to sell his principals property, sells it without naming him and receives too, must he is liable if he has not paid it over Comyn 505 Esp Dig 109-210 —

The rule is laid down with this qualification "provided &c" The rule is laid down in relation to the circumstances at the time of bringing the action

34. If the Agt has not paid over at the time of bringing the action & at the time of demand. I think he cannot avoid the liability by paying it over afterwards. 4 Burr 1985 5 Ibid 2639

35. But if the party thus receiving the money, bona fide is a known Agent, and the money is paid him as such, he is not liable to the payor (though) though he has not paid it over, for he acts professedly for another and payment to him is the same as payment to his principal 2 Burr 1984 5 Ibid 2639 4 Co Rep 553 Bul N.P. 133 2 Ray 1210-1 Stran 480. Contra = Doctrine Salk 27. which is not law.

36. In Strange it is held, obiter that if the money is not paid over at the time of action brought the party may recover of either the Principal or Agent. I think the Decr incorrect the proposition clearly is in reference to an agent who had violated his trust —

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37. It seems that the person receiving money by mistake though he was not a known agent was not liable on the principal of the last case though he has paid it over yet if he has paid it over before action brought or demand made he is not liable But if the action is brought or demand made before it is paid over he is liable Cowp 565. Esp Dig 109 & 210

38. Hen I would observe that where an agent duly authorized actually receives money for the Principal but which cannot in good conscience be retained from the Payer. The Principal is liable in every case whether the Agent is or not. This supposes the Agt to act honestly and within the scope of his authority. When the Agt by a secret fraud receives money in the Principals name which he ought not to have received he alone is liable Stra 480 1 Camp 337 Esp Dig 110 & 211-2.

39. In the second place this action lies for money paid on a consideration which has failed 2 Burr 1012 Esp Dig 206 7 A failure of consideration within this rule consists not in the want of value in the consideration rec? but in not receiving the consideration itself as stipulated

40. A pays money in advance to B for specified goods & B delivers them a want of value is not a failure but but if B does not deliver but sells them. here is a failure

41. This action lies for money paid in consideration of a grant of an Annuity when it fails. A pays money

to B for a Grant of an Annuity and that becomes void for want of legal requisites 16. the Consideration fails 1 J Rep 732 .. 2 do 356 .2 Esp Rep 639. 4 do 196 6 East 241 3 Bos & P 16 Esp Dig 2 & 7.

This rule as to annuities requires a qualification The Grantee cannot recover in such cases where the Grant is defective, unless the Grant has been set aside, or the Grantor has refused to pay it & has refused to execute a valid contract - 1 Esp Rep 309 Esp Dig 3, N.Y Ex. 3 Esp Rep 102, 261.

42. If one has paid freight in advance, the money may be recovered if the goods are not transported unless
43. the neglect to do it is occasioned by the Freighter 3 Johns 340. Esp Dig N.Y to. 9 -

44. So money is recoverable if one has paid it in advance for the purchase of Property to which the vendor cannot or will not grant a title according to the executory Contract -

45. The Party here may recover damages, or by bill in equity enforce performance or may bring this action disaffirming the contract but if sues on the Contract would be an affirmance

46. If one has paid money in advance for property to be conveyed hereafter, and the property differs from that contracted for he may recover it back 1 Esp Rep 150. 3 Bos & Pull 162 Esp Dig 4 6 Burr 2639 But if the Party in the case supposed had paid the money under full knowledge of the circumstances or quality of the Property - he

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pays for what he intended and cannot recover it back "volenti non fit injuria" Esp Dig 5 or 12, 4 Esp R. 241 2 do 723 1 Dall Rep 65.

47. But this Rule holds only where the Cont. is Executory. where one has paid for land and received a deed of conveyance, he cannot recover the money, his remedy is on the Cont. in the deed 2 Dall Rep 100 — 3 Johns 85 Esp Dig 10. Contra 1 Dallas 428.

48. When one advances money to another for any act to be afterwards done by the other, if the latter disables himself from performing he is immediately liable to pay back the money though the time for performance has not arrived. 1st Contracts 5 Cok 21, 1 Esp Rep 480 2 ibid 522

49. Again where money has been paid in advance for purchase of an estate and the Payer recedes from the agreement, as he may do in consequence of misrepresentation of the Estate he can recover the money paid, Int. & Expenses incurred under the Contract 1 Esp R 268 Esp Dig N Y ed (27) 11 — 1 Dallas 428.

50. For purpose of recovering such expenses they must be specially alledged in the Declaration 1 Esp Rep. 221 Esp Dig 11 Ch Pleading 125 2 Esp R 641 — 2, 1 Bos & Pull 305 3 do 246

51. Any this action for money had and rec? lies for the recovery of money paid under a void authority. Thus if one B. forges a Power of Atty to him self to collect it for B. it is still liable to B.

but may recover it &c. — If C owed A and B. name & recovered the debt by a Judgt vs. A may still recover it back, for the Judgt is no estoppell between A and C for the suit has been brot in (C) B's name 1 S. K. 59. Esp Dig 3 & 12

52. But it is otherwise where a person obtaining a debt however unjustly, recovers it under the authority of a Court of competent Jurisdiction, for it then cannot be recovered back —

53. The Rule holds where it has been obtained under the Authority of a Ct of Compt. Juris- without Judgement. — — — — — — — — — — — —

A obtains probate of the will of a dec'd person by the proper prerogative Court, when in fact the will is forged. yet any debtor, who has paid in pursuance of the probate cannot recover it back but it would be otherwise if the testator were living 3 T Rep 125 2 Hen Blk 414. Contra Salk 27 & 37 Denis Ld Ray. 11, 12 3 Bur 1984 Comyns 565

54. 4th Y The action for money had and received lies to rec. money d'ant'd by extortion, imposition or any unconscionable advantage taken by one of another, circumstances 2 Bur 1012, Comyns. 182, 793. Doug 671

55. If a Pawnee extorts money from the Pawnor more than the debt and legal Interest for redelivering the Pledge, all the excess may be recovered back, this is taken out of the maxim, for the advantage that the Pawnee has over the Pawnor, and his power of oppressing him. Stra 915 Esp Dig 4. 5. & 14

Assumpsit

56. On the same principle a Bankrupt who has paid more than a proper dividend to a creditor to obt. an a certificate, may recover Doug 671 3 Dal 357 Same Rule applies if a third Person paid for Bankt

57. Again when money has been obtained by any unfair and unlawful means it may recovered back, tho the party claiming had a legal right to recover it provided his right depended on a question not of Com Law Jurisdiction —

A Son was entitled to a legacy under the title "of one of the Children of A & B," he obtained the legacy under a false certificate, for which unlawful act of obtaining the Certificate of his Parents marriage. He was compelled to pay it over to the Exr tho he obtained it honestly 1 Camps 129 Esp Dig 15 N.Y. Ed —

58. But when money has been recovd. on Judgt in a Ct of Competent Jurisdiction, the Deft. can never recover it back again — in any original action. This supposes the Judgt not to be reversed by writ of error &c for our Judgt is as conclusive as one thing 7 T.R. 269 300. 125. Esp Dig 1 Y Ed 16. 18. 1 (Doug) 130). Day 130. 4 Comyns Digest 1 McFarland 2 Burr 1005

59. But when a Judgt once recovered has been set aside by due Course of Law, or by reversal &c the money paid may be recovered for then the Judgt ceases to exist and that record is a good plea & producing the Reversal supports it — 2 Burr 1009

Assumpsit.

60. So when a warrant of Conviction is quashed the money paid under it may be recovered 2 Ld Raym 1419 Bull N.P. 131 —

61. When a Judgt has been reversed on a writ of Error it is not usual to bring this action for the recovery of the money paid under the Judgt but to have Judgt under the reversal in a Court of Error. Quaere hoc caveat —

61. But if money is paid on a Judgt after reversal & has been passed into the hands of a third person and on fair Consideration it cannot afterwards be recovered of him. and the Atty who obtained it may retain his fees 2 Day 152 Esp Dig N.Y. Ed 190

62. 5thly The Action for money had & rec. lies to recover money embezzled by another if an Agt or Servant wrongfully appropriates to his own use the money of his principal. the latter may recover 1 Peake Bul N.P. 130. 10 & 11. Esp R 172 Peake R 235 Esp Dig N.Y. Ed 17-8. 6 Pench 226. It has been held in such a case that Infancy in such a case is no defence for the action is founded in tort thro. sounding in Contt. 1 Esp R 172. Peake R 223. Esp Dig N.Y. Ed. 17-8.

63. This I think too broadly expressed. if the Party had wrongfully disposed himself of the action would lie for the tort, But if an Infant Agt should be entrusted with property, no action would lie for here there is a Contt of Bailment by which the Inft cannot be bound 8 T Rep 335 — — — —

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64. So again money may be recovered back from a third Person who has rec'd it illegally, or may issue from the the Legislature if an Agent loses his principals money by unlawful gaming, the Principal may recover it from him 1 Ld Raym 179 2 Vol 1-755 Esp Dig N.P. Ed 18.

65. 6thly A Party who has paid money on an executory Contract may recover it back i.e. where a Contract is illegal on one side & where it is made unlawful for the protection of one of the Parties & the other, for here the one Party is not Particeps Criminis. Thus where a Dr has paid more than lawful Interest he may recover back the Excess 2 Wils Rep. 149. 1 Term Rep 65 & 915. Salk 35. 6 Mod Rep 165 Esp Dig 6. & 20.

66. But the rule is otherwise where the Payee is deemed as Particeps Criminis & the Party where he is deemed the more guilty Party Cowp. 790 8 Mod R. 575. 1 Burr Con. 201. Esp. Dig 7 & 20 2. 3. 181—

67. 7thly. The Rule is that a party to a Contract, who is Pari delicto cannot recover back what he has paid on the Contract even where Contrary to the illegal act, is to be done, it may be recovered back. But after the act is done he cannot recover the money paid. 1 Contract, Comp. 451. 11 Peake Rep. 200-1 Bull N.P. 131 2 Comp 790 8 Mod 578. Esp Dig N Jan. 21 Ed page Bunny 12 13. to procure an office for him. it may recover back the money if he procure not, but not afterwards, & thirdly it ought to be recovered in Bulk case then there would be no inducement to do an illegal act.

68. As to money deposited in the hands of a Stakeholder

on any illegal contract, as an illegal wager. if the money has been paid over on the event happening as with the loser's consent – it cannot be recovered Esp Dig 7 or 22.19 a 55: 56. 8 J Rep. 575 Doug. 696 M. & Sel. 3. 298

69. On this subject all the Rules cannot be reconciled It has been determined in N.Y. that the last Rule holds if paid over without the Losers Consent, even after the event 4 Johns 426 Esp Dig N.Y. Cas 25. 55

But otherwise if the Stake Holder has paid over to the winner after being prohibited by the loser, and after Action brought by the Loser, I cannot conceive that bringing an Action is necessary 5. J Rep 405 3 Caines 222 Esp Dig 15 N.Y. Ca. 55. this is opposed to the case in Johns 426 Esp Dig N.Y. Ca. 25. The Eng Rule seems to me to be peculiarly correct: Park Ins 8. Marshall 43.

70. It has also been held that if money is deposited on an illegal Wager, and not paid over either party may recover his own deposit even after the bet is determined. The Court says he can not in conscience retain the deposit of either party 5 J R. 405 3 Caines 222. & ibid 381. n. 7 J Rep 535 Esp Dig 13 Ca. 181. Contra 4 Johns 426. Esp Dig 25. 55.

I think the rule as decided in Eng is correct for the Contract is Executed till paid over

71. It has been decided in Eng that money deposited on an illegal wager may be stopped in transitu and the Depositor must pay it back 3 Caines 222 Esp Dig 24. According to the Report of the case it was held that money paid before hands by one party to an illegal Contract to the other

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may be recovered even after the event is decided. I think this decision incorrect 7 J. Rep. 536. Hewson vs 3 J. Rep 575. it is said this case is misreported and that it could not be recovered 1 East 98.

72. If one has paid money to a 3d Person on an illegal Contract for the use of another, the latter may recover it for the 3d Person may refuse to return it having no Eq[uity] thereto, Bac Abr Title 3. 295. Esp Dig 24. The 3d Person here is not a Stake Holder, but a mere Volunteer a common depository to deliver it over immediately.

"These cases relate to Indebitatus Assumpsits for Money had & rec[eive]d"

Miscellaneous Cases

1. Where a claim to money is given by Statute the Action of Assumpsit will lie to recover it, as where a penalty is incurred under the by Laws of a Comp[an]y 2 Levinz 252. Esp. Dig 6 or 25. The Theory is that each person on becoming a member tacitly consents to pay all just dues. When any Officer or Board of men are appointed by the Legislature to lay an assessment as Commissioners of Highways &c. if they lay it & they can have that action to recover it. Bac Ab. P. 129. Esp Dig 6 or 256

2. Same action lies to recover fees allowed by Statute. 747. 6 J Rep 682 Salk 330. Bunbury Rep. 182 Esp Dig 6 or 26, 256.

3. It lies also to recover any allowance or reward allowed by Law. as for discharge of duties enjoined by Law

Assumpsit

as when a corporation is allowed by law to maintain a Bridge by toll 13 Bur 1308 or 1408 .. 1 Wils 413 .. 2 do 764 Esp Dig N.P. 30 .. Three last classes all when special assumpsit lies

4. Another form is for money paid and expended, the Gen. Rule is that if one has laid out money for another by request express or implied the former may recover it, the principle is that the Law implies a promise by him for whom and at the money was paid to repay the same 1 Bur 373 .. Esp Dig 10 or 31 -

5. The action will lie though the debt-payment was for a thing on an illegal Con?, as money won at gaming, for the 3d person is not a participes criminis paying the debt is virtually lending the other so much money 2 Wils 309, 1 Marsh 139, Esp Dig 10 or 31 ..

6. If one of two Joint Debtors pay the whole or more than his part - he may recover his part of the excess paid .. may recover the excess 3 Bos & Pul 433 - 6 Esp 194 .. 2 Wils 283, 8 do 186.
This Rule does not hold as between Joint wrong doers 8 T Rep. 186.

7. It is a gen. rule that no person can by voluntarily paying another debt without his consent express or implied .. gain a right of recovery, 8 T Rep. 310 .. 613 Esp Dig 10 .. 31 -

8. To this last rule there is an exception where one pays the debt of another at the latters request with the expr.

Assumpsit.

-es a implied, when one is compelled to pay money by Law, he does not pay by the others request and may recover tho without actual request If A's goods are in B's hand when rent is due (to) from B. & A's goods are taken and sold for rent, A may recover of B. the amt. 2 Keb. 104 Esp Dig 101 a 31 86 a 176, 8 Mod. 308. 3 Esp. 8.

8. 2 Bos. (When is an excepⁿ with respect to express or implied consent of the debtor. which is in case of the dishonour of a Bill of Exchg. when any one may accept the Bill for the honour of the drawer — returning again, On the same principle a Surety who has paid money for the Principl may tho' recover, tho paid without suit for he is compellable to pay and in this case assent is implied 8 Mod. 104. Comyns. 525. Esp Dig 60 or 31. 96 or 190. In this case the Surety may recover tho the debt be unconscionable. 1 Mass 139. Esp Dig N.P. id 133.

4. When an some qualification to them can in any way If one as security gives his own promissory Note for discharge of the Principl's debt, It has been held that he may recover, after money paid tho he has not yet paid the money Wil. 3. 60 1415 5 Mass 299. 2 Esp R. 571 — But it has not been determined. thus if the Surety gives his Bond and discharges the debt, he cannot have his action until he has actually paid.

The Ct observed that giving a Bond (would not)

will not entitle the Surety to the action even tho a note or Bill of Exchg would 3 Cut 169. 2 Barnwell & Adams 52. 3 Johns 202 - 5 Esp 1 Esp Dig 32. Chitty lays down another Rule where the Surety takes up a debt and discharges the principal by giving an obligation in his own name, he may bring a special action in his own name on the Cont of Indemnity for not indemnifying him. He lays down the Rule as a decided point. "But I do not find it so. 1 Chit Plea. 340. 2 do 87."

10. When one of two Securities pays the whole debt he may recover a proportion from his co-security 2 Bl P. 268. 70 2 Doug 492 Esp Dig 32. 2 Day. 492. the case of Doug he cited is not down for 2 Day. 492.

11. But if one of two Sureties become such at the request of the other, the Surety making that request cannot recover of the other tho he pays the whole. But if the other pays all he can recover of the first. Esp Dig N.Y. Ca 33. 2 Esp Rep. 470

12. If one of the principles in a Bond with Sureties procures a Stranger to pay the debt. The Stranger may on his the principals promise recover of all the Principals, but not of the Sureties 4 Johns 170. Esp Dig 33

Assumpsits upon or arising from an Express Contract

1. In a Cont of Sale, except when the risk of title is as

-umed by the vendee, the vendor is presumed to know a title. Any fact importing the Property to be is concealed from the Vendee. He may recover back in this action, what he has paid in advance, the action lies in disaffirmance of the Contract. 5 Bac 26 39 6 Johns 5, 1 ibid 274. Esp Dig 11. & 35.

2. But where a Person covenants to sell, without having title, but afterwards acquires it before he is required to make a Conveyance he cannot afterwards be allowed to refund the payment in advance, for the vendee suffers no loss, and the title subsequently acquired enures to him, 1 Esp Rep 184. Esp Dig N.Y. 356— And if an entire Contract is made for the sale of Specific articles, to one of which only the vendor has title it, good. all the money paid in advance for the Articles may be recovered, A Contracts for a House and Chaise giving $300 but the Chaise when no title to.

3. But if the articles had been agreed for Separately at several distinct prices, he can recover only for that part only, which the party has no title to, here the Contract is in the nature of a separate agreement for each article 4 Esp. R. 221. 2 ibid 150 3 B & P. 182 Esp Dig N.Y. Ed. 37.

4. On Sales at auction on (fruitful) condition, containing a warranty, which are printed Conditions, they are conclusive, and cannot be contradicted by any verbal declaration of the auctioneer at the time of Sale, inconsistent with them. He is

liable to refund for any breach of the Condition even tho he has paid the money over to the Principal, he is regarded as a stake Holder Rather than as Ag[t] of the Principal 5 Burr 2639. 1 Hen Blk 289. Esp Di 12. & 37. 8.

5. In those Cases where the action is brot to recover money paid on a sale it is a disaffirmance of the Con[t]. When the vendee sues in damages for non performance of the Con[d]n it is an affirmance of the Con[t] and should be brot against the Principal unless the Auctioneer will not disclose him, but when brot for money in disaffirmance of the Con[t] the action is against the Auctioneer. Peake Rep. 120-1 V. Rep 133 2 Hen Blk. 573. 5 5 Cont 444. 7 East 247.

6. In a Contract of Sale if the price is paid and the Vendor does not deliver the Property the vendee may recover the money in disaffirmance of the Con[t] or may recover damages in the Special Assp[t] in affirmance of the Con[t] on the express agreem[t] for non delivery. 1 Term 407. 2 Blk 448. Esp Dig 13. 4 & 41

7. When a trader gives Credit upon goods sold he cannot maintain for the price until the time of Credit has expired, there is no breach of Con[t] till then But if the Credit was obtained by fraud he may sue immediately on discovery of it, then if one should personate another and obtain Credit thereby &c. 1 Esp Re 430. 2 ibid 522 6 Johns 110 Esp Dig 1 V. 48 The Principles is, that fraud avoids the express agreem[t] by the Credit & leaves him liable as if no credit had been

8. agreed upon. Where there is a Cont. to pay for goods sold at 3 Months Payment in Bills and 2 Months if the Vendor cannot sue for the price until the 5 months have expired. For the Construction given in the said Cont. is a delay of payment for 5 Mo. But at the end of 3 Mo. the Vendor may sue a Special action on the case for damages in not delivering the Bills according to Contract 4 Esp. 147 3 B&P 582 Esp Dig 49. 1 N.R. 330

But at the expiration of 5 Mo. the Vendee is not bound to accept the Bill but may recover the price in money 1 N.R. 330. Esp. Dig 49.

9. If A. agrees to sell & deliver to B. goods, & to accept the Security of C as payment, & C becomes insolvent before the delivery of the goods. A. is not bound to deliver unless he agrees to take the risk of C's responsibility. The understanding of the Parties in such case is that C should be solvent at the time of the delivering of the Goods. Abraham 117. 1 Mals. 405 Esp Dig N.P. 49.

10. If after a completed contract of Sale, the vendee refuses to pay, unless he receive the Goods the vendor may sell them and recover of the first vendee the difference of price 5 Johns 395 Esp Dig N.P. 50.

11. Upon a sale of goods, as where the vendee refuses to accept on tender, the vendor may recover the price, the suit must be Ass.t for goods "bargained and delivered" if his Declaration be for "goods sold and delivered" he cannot maintain

See action 4 East 61, 251, 1 East 194 & Blk 448. Stra 506
4 Burr 2101, 5 Johns 395 —

12. The vendee is entitled in this case to the goods, and on refusal to deliver them may recover in an action of Trover. 4 Esp 251 Esp Dig 61. 7 Id 50.

13. What is called a symbolical delivery is sufficient to warrant the allegation of "goods sold and delivered" 2 East Rep 17. A Symbol is something relative to the representation of an article, the delivery of the key of the warehouse containing the goods is I think the meaning of what is supposed to mean a "Symbolical delivery"

14. On an agreement for a purchase and future conveyance, the vendee is not bound to accept a conveyance by Atty. If it be thus tendered he may refuse to accept and notwithstanding such execution by Atty the vendee can have an action for breach of Cont. 1 Esp 1 Esp 115, 2 do 268, Esp Dig 7. 50

The Principle is that a Convey^ce by an Atty must be strictly the necessary proof, the vendee is not bound to know whether the Pow^r of Atty is sealed or not, this Rule has been lately settled —

Wagering Contracts

15. Not the recovery of these this action lies. For money fairly won on a lawful wager Assumpsit is the proper remedy and generally the only one. By principles of Com Law a wager fairly won is a binding Cont^t Esp Dig 18, 31, 34, 693. 1 Pow 184. 146. Com. 37, 729 —

Assumpsit

...ious opinions are that the Com. Laws as regards the subject of wager ought to be abolished & abrogated 2 T. Rep 610. 3 do 673. Mans. Jur 71

To recover money won on a illegal wager, the declaration must be special a gen. Count cannot be maintained L. Ray 69. Salk 23. Carth. 338 3 T. Rep 704. Esp Dig N.P. 56.

16. Use and Occupation

For the use and occupation of Lands and tenements on a Parol lease express or implied. This action lies. this action (for use) was unknown to the Com. Laws. Introduced by Stat

17. This action will not lie where the letting was for unlawful purposes as for keeping a Lewd House. Esp Dig N.P. Ed 56. Esp R. 13.

18. This action can be obtained & maintained by Tenant at will who is deemed to have no substantial title against his under Tenant who has occupied Esp Dig 21 & 58. Dennison. It has been held that the action was already maintainable. The Rule is in General that where one has enjoyed Lands & tenements by the demise & permission of another the latter can maintain the action 5 T. Rep 4.

19. This action is transitory, If the venue is laid wrong it is of no consequence unless done to mislead the Def.t 2 Camps 374. 1 Taunt 570. Esp Dig 50 The reason why this action is not local is that the title is not involved in

20. the Question. = Under the Stat. 32. 2d If a Tenant for life makes a lease for years which determines by death

before the expiration of the term his representatives may recover the rent pro. rata. But not at Com. Law for then the rents accrues altogether at the Expiration of the term Ambl. 198. 2 Blk. 1016. Esp. Dig 21. 2. 62

21. Another Class of Cases where Special Assumpt. lies is to actions on Bills of Exchg. & Promissory Notes and Policies of Insurance not under seal. that is policies by Individuals and not by Corporations. Notes that between some of these debts has been brot. vide these Titles.

22. " It was determined in 2 Cases that Assumpsit would lie against an Ex. at Law for a Legacy, provided he had Assets and had expressly promised to pay — Now Denied. — The Recovery must anciently be in Chancery. That it would lie at Com. Law vide Esp Dig 86. 2 175. Selw 284. Tolen 465. Com. Dig 5 T Rep. 690. 8 Ves 593. 3 Ac 55 Peak R. 73. —

The only Objection to the action at Com. Law. seems to be this. That where a married woman is a Legatee. Equity will require that the husd should make a suitable provision for her. which Com. Law Cannot do.

The action is at Law agnst the Executor for the Legacy on a action for breach of Covt. in the Bond of the Ex.

23. Assumpsit lies to recover the Lawful fees of Office. If one intruder into another Office and receives the fees of Office he is liable in Assumpsit for money had & received to the true Officer. 6 T Rep 681 Esp Dig N. 29. 176.

Where this action will not lie

1. In Tort. when there is no privity between, and the parties

Assumpsit

If the case exclude the presumption wherein promise is implied one, the action will not lie for it is always founded on a promise express or implied.

Hence if it appears, in Assumpsit for money had to the Defts use, that the payment was without his consent express or implied the action cannot be maintained

The Person cannot by his act make another his voluntary debtor 1 T Rep. 20 Bul N.P. 130 1 Esp Rep. 309 8 T Rep 610. 6 East 392. Esp Dig, 86. 7 — a 176-7 —

This rule is not predicable of cases where one is by Law compelled to pay the debt of another or where in voluntarily pays what by Law he is compelled to pay for another.

On this principal a mere voluntary contract will not support an action.

That is an action done by me for the benefit of another without the others request a promise with any certain prospect of recompence, a mere mighty (true) acts — Esp. Dig 87 a 177. Yelv. 106. 2 Strat. 728. On this principal, where Pt. for a length of time rendered services for D. without a Contt and without expectation of payment but in hopes of a legacy being given him in D's will. It was held that the action would not lie for the services.

2. This rule does not hold to a voluntary Courtesy where the act done for another is at his request.

As if I request to ride a mile for him without however intending to pay him, he can recover on a "quantum meruit".

3. When an act of Courtesy is done by one person for another at the others request it is sufficient to raise an implied promise 1 Lev. 105 110 Esp Dig 88. 178.

4. In Gen any thing done by another person in his professional business. tho without request it is not deemed to be a voluntary courtesy. for in such cases a reward is Expected —
A Packet Master of N Haven finds a bale of goods belonging to B in N York which he brings home & B accepts it. B must pay. for it is in the Master's line of business, hence is a presumed expectation of an award & a presumed intention to pay Esp Dig. 88, & 178.

5. 2 Dig. This action will not lie upon an illegal Contract. 5 T R. 242 Esp Dig 88. 9 — 178. 9 — Bac Ab 16.

6. Under the head of Illegality an elopement tho' contrary to honour & decency. Hence the action will not lie to recover the price of a Hill — or any other indecent — Bull NP 1 Esp. R. B. 1 Camp 348, 4 Do 97, 1 Bos & Pul 340. Esp Dig 182

7. Again if the consideration of an entire Contract is in part illegal this action will not lie. as. I promise the County Sheriff $1000 in consideration of his paying me $500 and suffering an Escape, here no division can be made of the contract it must all be void. vide Contracts (D) Vol. 1.

8. Where one has been compelled to pay

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money in consequence of this breach of duty but on another account he cannot recover it back & sheriff cannot recover of an escaped debtor that he has been compelled to pay for the escape 3 T Rep 171 — Peake Ev. Rep. 144 Esp. Dig N.P. ca 185

9 — Assumpsit will not lie on a promise to pay for doing that which it was the promisors duty to do, without (exp) reward As if a Person arrested promise a Sheriff a sum of money if he will accept bail when it was the Sheriff's duty to do it 2 Bur 924 Co Jac. 103 Peake R. 72 Esp Dig 93. 86

10. Nor will this action lie to recover on a Contract to defraud 3d Persons.

A promise by Clerk a sum of Money to conceal a debt from A to B, Doug 433, Show S. Rep 537 4 Burr 166. 6 Burr 246 Esp Dig 93-4-186-7 — Vide Contra

11. Nor will it lie to recover any unconscionable demand, That is a sufficient answer in all cases of implied Assumpsits, There are however cases where one may bind himself by express contract, which is unconscionable Comp. 793. 114. Esp. Dig. 94. 5. or 187-8-

12 Nor will this action lie for a debt or any other demand accruing upon a Specialty, the action must be on the deed Co Jac. 206 B. Show 162, Bul N P. 155 Esp Dig 162

1 Pont. 219. 423. a fortiori this action will not lie for
debt on Judgments and an express promise by Deft - upon
Sufft to pay the Amt in Consideration of forbearance is
not Good. The Pltff has a higher remedy Comp. 129.
And the rule must be understood to be the same when
the promise is by the Obligor in a Bond, for the Bond
is of a higher nature than that of a promise
3. But the Promise gathered from Payment to pay the con-
tents of a Judgt or bond is at Com Law good for him the
promisee is not bound by the bond Comp. 129
14. This action never lies to recover money paid from
motives of honour or honesty, tho there is no legal Obligation
to pay it. this shows supposes no illegality in the Payment
If one Pays a Just debt barred by Statute of Limitations
recover it 2 Burr 1012 a 1012, Esp Dig 98. a 193 -
15. When a Claim depends on a mere) question of right not
surely Triable by the gen. action of Ind. Assumpt that ac.
will not lie. Hence it is determined that when one proceeds
on a Distress he cannot recover it in this action though
the distraining was illegal Comp 414 & 818. Doug 915
16. It was formerly held that when there was a false and
fraudulent warranty in the Sale of goods the Pltff
cannot recover what he has paid in the gen. action
of Assumpsit but can have an action on the warranty
in Auctoribus. Esp Dig 98. a 194 - 1 T Rep 98. 133. 6. Doug 23
7 T Rep. 181. 5 East - 449. 7. do 274. 1 Comyn Contr 38.
This has lately been denied see "Trespass in the Case"
3. Esp. Ro. 831. Selw. 688. N.
17. This Action for money had and received, lies only for money

Assumpsit

strictly so called. It will not lie for Stocks, Bills of Ex. or even Bank Notes the answering quality of the purchase of money 2 T.R. 684. 5 Burr 2567. Esp Dig 99. 194

There is no other reason than that this action was framed for the sole purpose of recovering of a person the money in his hands belonging to another

18. When one Party has agreed to deliver a certain quantity of goods by a certain time, & delivers part of them during the time, he cannot sue for that part (so delivered) before the expiration of the time, He cannot recover at all for the part delivered unless the vendee expressly or tacitly consents to receive the part instead of the whole. 1 T Rep. 181. 2 N R 61 Esp Dig 139, a 247. 3 Johns 534

19. When goods are purchased by sample, and the Bulk of the goods do not equal the sample the vendee is not bound to accept or pay for them and this after receiving he finds out the circumstance

— This would be the case even if there was no fraud for in such a Sale there is an implied agreement that the bulk of the goods shall equal the sample 1 Camp. 113. Esp Dig 248.

Of the Pleadings & Evidence

1. Where the right grows out of a Special agreement the Plff should declare on that agreement, declaring generally would not inform the Defd what the cause of action is. Doug 24 1 T Rep 134. 1 Bul N P 139. Esp Dig 130 249.

2. There has been much contest on this question whether a (gen. & special declaration) gen. and spe. Count can be both joined in the same declaration —
It is now settled that a Gen Count on any implied promise, may be joined in the same declaration with a Special Count —, on an express promise, this may be done when there is but one claim and 7 Bac Ab. 139, 6 Esp Dig 1110, a 265. 1 Bos & Pul. 354, 7 John 132

3. Where there is a gen and a special Count in one declaration, if the Plff fails on the special he may go into proof on the general Count and recover in that this supposes the Counts to be on one and the same demand,

4. But when he proves his special Count he must depend on that alone (is an election, 6 Mc 321. 3 do 412 444, 1 Scho & L 83.
A agrees to Build a House, this agree: is special, & in Assmp may insist a special Count, and the Jn Labour performed on a quantum meruit, if he cannot prove the special Count, he may go into evidence on the general Count,

5. But when there is a Gen & Spec Count if the Plff proves a special agreet not recorded, but different from that alleged in the Declar" he cannot recover on the Spec Count by reason of a Variance, but on the Gen Count, on the implied promi because he has proved a

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Special agreet 3 Burr. 1825, 25, 1825 Bul NP 139. 1 Selw NP 83 Stra 638. 725. 1 N Rc. 354 1 Camp 471. 1 Wils 117. Esp Dig 264-5 Another objection to a recovery on the general Count — is whether it in fact a special agreet & performance by the Plff is a Condition precedent. But if he could recover on the general Count he could avoid the Contract, a distinction when there is a special Count if the special agreet is proved but one in which the Plff can never recover on his general Count as if the special agreet be varied or rescinded 7 T R. 181. 1 N R. 354, 7 Johns 132 Stra 638. Bul NP 139. 1 Selw NP 83 n.

6. It has been held however that when one has fully performed a special agreement for performance of which he is entitled to a sum of money he may either sue on the agreet. or on quantum meruit Wils 177. 1 Selw NP 83 n.

By the rule means what it seems to import it Cannot be Law it would be a gross wrong that a person who has contracted for a certain sum to receive a different amount after more or less if the terms of the agreet are not performed by the party claiming payment, neither he nor his representatives can recover in any way whatever neither indeed in a general or special Count hence when a promissory note was given to a Seaman for a gross sum of money on condition of his duty in a merchant and during the whole voyage & he during it died it was held his representatives could not recover any thing 6 T Rep 325 Esp Dig 244. 65 (vide p. 117 n. 8)

Quid semper in merchant-law.

This example I think not now Law for the agreet would be now governed by the Mercantile law. the rule of which law is different, for where a Seaman was disabled during the voyage, it was held that he could recover for the whole

2 Hen Bl R 605 n.

7. If at having agreed to perform a certain undertaking for B voluntarily leaves it unfinished without B's

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Comyns. he cannot recover for the part so he has done however large that part may be— 2 Mass 147 n 2 New R. 61. n. Esp Dig 182. n 253. Stra 638 There is a dictum upon this rule but it is not Law 1 Selw NP. 83. n.

8. The rule is the same tho performance was prevented by inevitable accident 6 East 320.

9. In the action of Ind. Assumpsit when the indebtedness is always stated as the consideration & the Promise it is necessary to shew, in the Declaration from what the indebtedness arose Cro Jac. 206. Carth 276. Esp Dig 255.

10. It is sufficient however to say generally that the dept being indebted for goods sold and delivered" labour done and performed &c without shewing what goods or labour, & indeed it is sufficient so to allege it as that it shall appear not to have arisen from a Specialty Esp Dig, 285 n 265 n 255 Carth 276. 3 Bulst 31—

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note. I cannot see how the Judge can draw such an inference as he has, in commenting upon Sec. 6. P. 116. he concludes from the proposition that there is a special agreement to be performed for a specific price, now, in the proposition and the cases cited Vol. 117. & 1 Selw NP. 83. it does not appear that the same was the price but rather that he was to receive his pay for the labour in money. The agreement I consider to be abrogated as far as the party has performed. the promise is open to pay. the amount is open to be ascertained. &c.

1 Selw NP. 83

Vide indebitatus counts

Assumpsit

11. In alledging the undertaking the usual words are, undertook & faithfully promised, but they are not essential

2 New Rep. 62

12. The day laid in the declaration at the time of the promise is immaterial it may be alledged on one day and proved to have been made on another 1 Stra 621. 2 Ibid 806. 5 T. Rep 620. 2 East 257. Esp Dig 135 or 258

13. As respect written Contracts which bear a date the law is different, the date must be described 1 Chit Plea 258

14. If a promise is laid on a day when the defendant was under age and the defendant takes advantage thereof the Plff may reply and set forth a different date 1 Salk 279 Strange 806 Esp Dig 137 1 Chit Pl 258

15. When the cause of action is to arise upon request the day of the request as alledged in the declaration is immaterial as regards the terms of the Contract the day is not material Esp Dig 135 or 1 Chit Pl 258 ———

16. When the declaration is founded on a special agreement the agreement must be proved expressly as alledged if not there is a variance which is fatal

17. When the action is founded on a special promise the declaration must correspond with the promise ——— Bull N.P. 145 Esp Dig 138 & 262

18. The consideration must be truly stated or there will be a variance for the consideration is part of the Contract though the promise is proved precisely as alled-

-ed in the declaration. yet if it appears that the promise was made on a different consideration the variance is fatal. Cro. Eliz 79 Esp Dig 140 " 264 "

19" The place laid in the declaration is immaterial for the action is transitory the promise may be alledged to have been made in one county and proved in another, the Common Law as respects this is different " 1 Lewins 143 " 10 Mod 348 " Ballindin 241 " 243 "

20" This rule again may be different as applied to written Contracts, when the true place must be laid if the contract be made at Philadelphia and the action be brought in New York. the Writ declares as follows " viz " The Sheriff &c at Lancaster Philadelphia to wit at New York faithfully promise and undertake &c " " "

Pleadings on the part of the Defendant

21" The General Issue is Non Assumpsit

22" Under this Issue almost all defences may be given in, Any special defence whatever that goes to the denial of the debt or duty which is alledged as the consideration of the Contract may be given in evidence under the General Issue

23" Under the Gen Issue the defendant may give in evidence " Duress " Usury " Infancy " Coverture " Release

payment. accord and satisfaction. A former recovery of the same debt. Award of Arbitrators or a Bond or other Special ty. given for the same debt which merges the Simple Contract Strange 478 2 Burrow 1010 2 Ld Raym 566 5 East 230 4 Esp. 181. Not one of the above Special pleas can be given in evidence under the Gen Issue.

24. In the action of Indebitatus Assumpsit there is in point of fact no promise made. though one be laid in the declaration. the mere indebtedness is the cause of action The indebtedness as laid is mere a fiction

25. Any thing which denies the indebtedness though the indebtedness is now extinguished is actualy a denial of the whole cause of action. under some of the special pleas there never was an indebtedness as in the instance of Duress. for if a person enter into an obligation through duress the obligation is void because there never was a consideration and of course no indebtedness

26. In the action of Assumpsit the Genral Issue amounts to not indebtedness at the time of Pleading

27. The Statute of Limitations is a good defence, and must be pleaded specialy, reason assigned viz. that it must be pleaded specialy because it is matter of Law and it goes not to the gist of the action but to the discharge thereof. It goes to

Statute of Limitations

the remedy. It goes to bar the action but does not deny the debt - or cause of debt - or in other words that a debt once existed, tender must be pleaded specially so Set off or Bankruptcy. none of these defences deny the debt - But go in bar of the action without denying the existence of a debt - 1 Saunders 283 n. 2. 2 Raymond 1534. 566 Chit on Bills 198 other defences Dig 117 1 Sid 375 1 Saunds 283 No 2

28. In New York and Connecticut the defendant can under the General Issue give in evidence the Statute of Limitations by giving notice Term N York 90 Dig N Yrs 279 - But the common Law requires the Statute to be pleaded specially even though it appears upon the face of the declaration to be more than 6 years from the time the contract was to be performed

The only effect of the Statute is to bar the remedy - The Defendant is presumed to waive the Statute unless he pleads it specially also it must be pleaded specially to enable the Plaintiff to bring his case within any of the savings of the Statute if it be within any of those savings as in case of Infancy 1 Leonis 110. 5 Burrow 2630 2 Saund 63 a. 1 Ventris 191 1 Ray 338

29. The action must be brought from the time the action ac-

-crued 3 years on parol promises by our Statute. the Statute of our state is a peculiarity. this Statute extends to neg -otiable Notes Bills of Exchange the time limited concern -ing which is six years. Bonds and other Specialties seventeen years.

30. This Statute with regard to its effect the rule is When it has once begun to run no subsequent event whatever, no subsequent disability whatever can arrest its operation if six years elapsed after such a cause the action is barr for example, Coverture &c Plt

37. The saving of this Statute applies to no case only where the disability existed at the time the action accrued Strange 556, 1 Wils 134 4 T. Rep 300 & 30. 1 Johns Rep 165 Esp Dig 148 & 282 and 285 = 3 Cranch 174.

Illustrative of the foregoing positions, take the Instance of a person going to sea. If the six years have expired which the Statute limits. and immediately after their expiration he goes to sea the claim is barred. but if before the (expiration of the time limited) he goes to sea. the statute does not commence running till his return

32 All parol contracts are in general within this Statute and these comprehend all debts except contracts by Specialty. Ballindin 86. Esp Dig 148. 282.

Assumpsit

33. Not only verbal agreements but Bills of Exchange and all contracts in general reduced to writing but not sealed are within the Statutes. If goods are sold on an express or implied promise the action is the same 1 Show 340 — Esp Dig 148 — 282 —

34. The action of debt for rent on a parol lease is within the Statute. but debt for rent reserved by deed is different Ld Raym 199 Ballindin 86–87 —

35. Debt against Sheriff for an escape is not within the Statute. The reason is the debt is not founded on contract but upon the tort. though the action sounds in contract it is an action of tort and not founded on Contract either express or implied 1 Saunds 38 — Ballindin 88 —

36. In this State the Statute limits two years in actions against Sheriffs for neglect &c in their official capacity —

37. Statute of Limitations against a debt on an award because not founded on Contract — 2 Saunds 64 Ballindin 90–91 —

38. It had been determined in England that an action against a Sheriff for money levied on an execution is not within the Statute, because the action is not-

founded solely on Contract but part in neglect of Official duty. Judge Gould says the distinction not a good one 2 Mod 212 Ballindin 91. 92 — Obiter against this rule 1 Mod 246. 2 Mod 212 being a later decision overrules the earlier decision —

39. A Debt barred by Statute of Limitations can not be set off against another debt. It will not support a Set-off. The Statute of Limitation does not extinguish the debt — vide notes 1st & 481.

40. No debt can be set off against another unless it be within six years from the time of Contracting Stranged 1271 — Ballindin 91 Peakes Rep 121 —

41. But to this Statute, in England and in this and other States, there is a general exception between Merchant and Merchants and between their factors and servants —

42. Running accounts between the aforesaid Persons are not barred. so stated in N York Statute Esp Dig 149 or 283 2 Johns Rep 200

43. Between Merchants and Merchants Though they be more than 6 years they are without the Statute the Particular reason of this Law. Judge Gould says he does not fully understand —

Assumpsit.

44. Mutual open accounts between persons not Merchants are not within the Statutes when there are credits given on both sides and are not barred provided there is a credit given within six years even one item and this takes out all the items on the other side Bul N P 145 and 149 – 6 T Reps 109 – 1 Vernon 456

The above rule is founded in construction Nation on
45. Partnership 211 – These latter rules hold only in open running accounts not to cases where an account has been adjusted – for if A and B have had an mutual – Computation & have compared and adjusted their accounts the Creditor must bring his action within six years – This rule holds between Merchants & Merchants 2 Saunds 124 – 2 Mod 312 – 1 Ibid 270 2 Vesey 400 – 2 Johns Reps 200 – Esp Dig N P Ed. 283

46 In N York it has been decided that the Statute of Limi-
amended tations on an action on Simple Contract – is a bar to a Judgement – in any other State 5 Johns Reps 132. Esp Dig 283. The ground of this distinction was that Judgements rendered in other States were not records –

47. Supreme Court of the United States has decided that a record in every State is a record in the

-er states - which obviously overthrows the above decis-
-ion 7 Cranch 481 - 4 Wheaton 234 —

48. In the application of the rule in Assumpsit as regards the Statute of Limitations. if the date in the Declaration does not correspond with the true time it is immaterial. the date may be without six years and the time proved within six and so vice versa the date is a mere legal fiction and all fictions in Law are calculated to promote Equity 2 Peirson 159. Cowper 434 8 Mod 109. —

49. But the commencement of a suit within Six years does not prevent the Statute from running unless it be proceeded with — If the creditor or promisee sues, commences a suit and then drops it it does not prevent the running of the Statute 2 Ray 883 Miles 257. 3 Term Rep. 662 Bul N.P. 151 Esp Dig 152 153 & 290

50. But if Plff within six years suing obtains Judgement which happens to be reversed after the elapse of six years. he then is allowed one year more to bring another action and this is an indulgence allowed by the express provision of Statute. the delay has been occasioned by the Law the party has been diligent and therefore ought not to suffer through the effect of the Law in this respect — Cro. Car. 294. 3 Levins 215. Ballentine 4. 156. — —

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51. The same provision is in our Statute —

52. There is a case where the Statute makes no provision. Suppose that a Creditor of a simple Contract dies very shortly before the elapse of six years the time limited for bringing the action. in this case the Executor or Administrator is allowed one year after the death of the Testator or intestate in which to bring his action Bul N.P. 150 Strange 927 Esp Dig 280 Ld Ed

53. There is a saving in these cases of the rights of Infants. femes Covert. persons non Compotes mentes. persons in prison. persons beyond sea. provided the disability or impediment exists at the time when the right of action accrued. in such cases the Statute allows to sue within 6 years after the disability is removed 2 Mod. 71. Strange 836. 2 Saunds 121 Esp Dig 149 & 284.

54. The Statute does not extend to actions of Assumpsit, nor to any other actions on the case excepting the action of Slander. Courts taking this subject into consideration thought that it had ought to be extended and hence extended it to the action of Assumpsit Wallenton 181. 2 Saunds 121 —

55 In England there is a saving by 4 Anne where the defendant is beyond sea in which case he is allowed six years after the Defts return to commence his action Esp Dig 150 & 285 Wallenton 178 4 — Some were of opinion that this —

-was in the saving of that Statute of James 1st Chap 21st But it was-
otherwise decided —

56. In the Statute of N York the legislature have adopted the
Statute of 4 Anne —
If the Defendant is out of the State when the action accrues —
the Statute of N York does not attach upon the contract
-until his return. The other corresponds with James 1st
-A & I. Chap. 183 — 1 Johns Rep. 165 — 1 Johns Cases 76 Esp Dig 283

57. If the defendant is non compos. an Infant in prison &c be-
-yond sea the Statute does not attach until the disability
or impediment is removed —
It was once supposed that according to the effect of the
Laws, Some Courts &c. &c. Could not sue until the six
-years had expired. This is no doubt but that they may
sue under the impediment as well as after 2 Saund 117 a. 120
a Wilson 143 Esp Dig 149 and 150 & 284—5.

58. But where there are joint Promisees or Creditors the abse-
-nce of one does not prevent the Statute running 4 T.
R. b. 515 Esp Dig 149 & 284

59. This saving Clause extends not only to Foreigners but to
all persons and continues tile their return. The computa-
tion of six years time then commences 3 Mis 145 3 Johns
Rep 263 Under Statute of 4 Anne and Statute of New York

which contains a saving of the defendant. it has been determined that the return of the defendant, takes the case out of the Statute or its saving clause at the time of return though he shall go there abroad. for when the Statute begins to run nothing can arrest its progress 1 Johns Cas 76. 1 Johns Reps 165. 1 Rolls 134

60. There is in the Statute of Massachusetts a similar provision as 4 Anne. But in case of return as mentioned before it should be such as to afford the Creditor an opportunity of suing or else the case would continue in the same case of the saving of the Statute 3 Mass 3 271 6%. Sig 285 Mass

61. In application of the Statute of Limitations the rule is. the lex fori shall govern. that is, The Law of the State in which the action is brought — shall govern —

62. Lex loci Contractus governs the effect of the contract, Lex fori determines the remedy, the time limited for bringing the action relates to the remedy 8 Johns Reps 253 Chit on Bills 260 1 Bolfantine & Fuller 13

63. The same saving of 21st Jam. 1 — is in Pennsylvania established The Court there decided that absence in South Carolina was not within the saving of the Statute —

64. The word has relation to the high or broad seas —?

Adams 218 Keys Ca 283

65. When the promise is to pay money on demand the Statute attaches at the time of the delivery of the Note, because a note payable on demand is payable immediately —

66. But when the promise is to deliver specific articles on request the English Statute does not attach till request made because a right of action does not accrue till request is made Ex. Dig. 149 Ed. 287 —

67. This Statute does not extinguish the debt but suspends & destroys the remedy the consequence is that a mere promise to pay before & after six years takes a case out of the Statute. It is a waiver of the statute from that time it is made then as regards the question of limitation that the Deft has made a promise 2 Ray 1128 1101 — Bull N.P. 149 2 Serm Reb 766 — Ex. Dig 151 or 287-8 Ballantine 188 —

The Law considers the consideration good and revives by the promise — a contrary doctrine was once held 2 Vente. 12 — —

68. It is a rule that if the deceased makes a devise charged with the payment of debts, those debts which have been barred by the Stat must be taken out of the Statute upon the supposition that the debt remains. Coo 548 2 Mils 383 Tree in Chan. 385 Powell on Ex. 288.

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6ly and a new conditional promise will take a case out of the Statute when the condition is complied with —
Thus When the Deft said "Prove your debt and I will pay you" this was held sufficient to prevent the Statute Bar. 5 Mod 151 Esp Dig 151 - 2 Vol 288 —

7ly When the Defendant made a promise to pay "when he was able" It was held that when he was able he should pay and that this took the case out of the Statute 3 Esp. 159 Ball. 189 2 Ves Bch. there is a very analogy in the case of Bankrupt —

8ly When the original Promise was made by the Testator now deceased a new promise by Executor will not subvert the action or plea of Statute of Limitations. non assumpsit, infra sex annos. This is the case brought on a promise by Testator. The declaration states that the deceased promised. the action must be against the testator on his own promise L Ray 1101 3 Ewd - 409 Ball 189 - 190

9ly Not only a new promise but any acknowledgement of the debt within Six years before the action Brought, will take the case out of the Statute, the acknowledgement is called evidence of a promise, but Modern Decisions have converted it into matter of law and fact. the cases on this subject are very far. 5 Mod 426. 3 Esp 155 - 7 4 Ewd - 399 - 604 Peakes

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Rep. 93 .. 1 New Rep 20 .. 1 Esp Rep 436 .. 37 ibid 46

73. Ken J Poulo obsrves that a man must tell a lie or hold his tongue if he will make an acknowledgement. A is indebted to B. A says "I am ready to account but nothing is due .. this th Ct held sufficient to take the case out of the Statute — Cow 548 2 Burr 1099 Esp Dig. 152 & 289 —

74. It is established law and fully decided that an acknowledgement of debt after action brot takes the case out of the Statute. these cases, says J Poulo go far Ballentin 190 It is well settled that an acknowledgement to a third person takes it out of the Statute. so that if there is any evidence of a debt arising within six years coming from the Defendant the cause will be out of the Statute 4 East 599 — Ballentin 191 & — —

75. Where the Defendant acknowledges that he once owed the debt but that it was discharged by Statute of Limitations. this amounted to a confession of the debt —

76. It appears that any acknowledgement within six years accompanied with refusal to pay will oust the Statute bar. though formerly held otherwise Pickets Ca. 178 2 Ventris 152 4 East 599 —

77. In another case where the Defendant offered to pay 2 shillings and six pence on the pound this was hol.

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- due to take the case out of the Statute 2 Campbell 11 Ballantine
78. 193. But further yet and beyond all the rest, in action of debt
on Bills of Exchange of more than six years standing. The defendant
moved and pleading to plead the Statute made an affidavit
that he was not called upon to pay it since the Bill
became due 4 Taunt-604 The words were." I have not been
called upon since the Bill became due" the last case goes
fully to convert the meaning and intention of that Statute which
was made to protect the person from being harrassed with
claims of long standing & for the prevention of fraud & perjuries
their Construction have gone further than the legislature
ever imagined or intended ——
79. That payment of a debt within six years will take a case
out of the Statute 1 Esp Rep 43, 1 Root-231 ——
80 An offer of compromise can never be given in evidence against
the defendant — no not in any instance. says Lord Mansfield
"A man should always be permitted to buy his peace with-
out injuring himself" therefore the instance of offering two
or six bottles on the pound seems inconsistent with the true
principles of Law.
81. Where there are several debtors by joint Contracts an ac-
knowledgement or part payment by either will
take the case out of the Statute for the act of one

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is considered as the act of both - and all in such case would be liable on the acknowledgement of one. Douglas 629 Peakes Cases 15. 203. Phil Evidence 72. 3. 3 Day 309. 4 East 599. 6 Johns 267. Esp Dig 152 & 288 and 299 — and this rule holds though the action is not brot against the particular debtor who made the acknowledgement - but against his co-obligor - A case in 2 Bentris seems opposed to this rule. but upon fully observing we find that the court decided upon the Jurys finding the Ct. should have charged the Jury to find a promise by both —

82. An acknowledgement by one Partner after dissolution of Partnership will take the case out of the Statute. but this proceeds on the rules regulating Joint debtors — 6 Johns 267 - 3 Esp 135. 1 Phil Evidence 72-3. 11 East 589 Chitty on Bills 209. Peakes Cas 16. 203 Esp Dig 289 —

83. The General Issue or usual form of the Plea of the Statute of Limitation is. "non assumpsit infra sex annos" or "Actio non accrevit infra sex annos" —

The latter form is always proper whereas the former sometimes is not. the latter is that the action has not accrued within six years 1 Mod 71 - 1 Bentris 191 Bentris 225. 215 to 225.

84. When the right of action accrues at the time of making the prom-

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—ise either of the beforementioned pleas are proper —

85. When the promise is to perform some duty or contract at some future time the Plea Non Assumpsit infra sex annos is bad on general Demurrer — If one gives a note payable within 3 months or at 12 hours from time of making the Promise the rule is the same because it is payable at some future Time 2 Salk 422 1 Mod 71 1 Vent 191 Esp Dig 156 or 244 Ld Raymd 838 —

86. The due mode was to plead in the affirmative "that the action did accrue within six years" 2 Vent 185 Ballantin 224

87. If the promise is a collateral undertaking to deliver articles on request here the Plea Non Assumpsit infra &c is bad 1 Mod 191 Bul N.P. 151 10 Mod 104 206

88. In whose the right of action is to perform a promise upon some act precedent non Assumpsit infra &c is not good Salk 122 Esp 156 or 244 —

89. But in an action of Assumpsit founded on a promise implied from an existing debt or duty either form of pleading will answer because in such cases the right of action accrues at the time the promise is made or supposed in Law to be made —

If A has money of B's in his hands and is liable to pay it over. The promise is supposed to pay immediately Bul N.P. 151 Esp Dig Abr. 244

90. But the second form viz. "Actio non accrevit" &c is substantial in all cases for the Statute attaches at and from the time the contract is broken. & when the right of action accrues this therefore is declared to be the safer and better form of Pleading 2 Saund 63 n. 6. Bullenten 218

91. These Pleas though they sound like the General Issue, yet they are special pleas and must conclude with a verification. The Pleas are tantamount to an affirmative allegation 1 Saund 283 n

92. In debt on simple contract the Statute may be given in evidence under the Gen Issue or plea of "Nil Debet," or it may be pleaded specially. for Nil debet is in the present tense. Thus this plea differs from non assumpsit in relation to the Stat. its being given in under it. 2 Saund cannot perceive the reason given for admitting the Statute under Nil debet as being in the present time is incorrect 2 Ray 1532. 566 Salk 278 2 Saund 283.

93. If the Plea goes to the whole declaration and is ill as to a part it is ill as to the whole. E.G.

A has promised to deliver to B a deed and also to convey a sum of money and these are both united in the declaration. the Plea non assumpsit infra sex annos is good as to the latter count

but

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but a promise to do a collateral act - as to deliver the deed, it being not immediately, is bad. therefore if the Plea be non assumpsit infra &c in such a case it is bad in toto as to the whole and in this instance the Plff will recover as well in the second count as the ground of his pleading as in the 1st - 1 Lev. 48.

94. The Plea must deny the promise or accrual of the statute within the same number of years or if the Deft pleads that the action has not accrued within 4 or more years the Plea is bad tho' it is a stronger plea apparently - the reason is that it cannot be traversed by an affirmative pregnant - The Deft pleads that the action did not accrue within six years. say ten years. the replies that it has accrued within ten years - now if the Jury find that it has accrued within ten years yet this is not within six years - 2 Ray 1099 6 East - 384

95. Such a Plea is ill only by general demurrer I would say) special demurrer because it is ill only in point of form. The former plea of ten years would be good unless specially demurred to 2 Ray 1099 - 6 East - 387 -

96. In an action for a Continued Trespass, which part is, and part is not within the Statute. If the statute is pleaded

damages can only be given for the trespass which is within the statute — E.S.

This same Stat of 21 Jac 1 limits the action to 4 years suppose the action be for damages accruing 10 years Trespass not — if the statute be pleaded the Plff can only recover for 4 Years Trespass — 3 Mod 310. 1 Show 493 Bul 228 — 9 —

The Deft may in his plea divide the time. Plead the Statute to part and some other defence as to the residue This supposes the Declaration founded upon two distinct Counts. one of which is more than Six years. to which the Deft may plead the Statute. and to the other may plead some other defence

97. So in Trespass the Defendant may plead to all the trespasses if he pleads Statute to part. he must give some plea to the rest — he may demur for form sake. if he does not — the defendant makes a discontinuance of his defence, and Judgment may be assigned against him Salk 420

Replication

98. The replication may declare Generally or Specially — that is. the Plff may reply affirming that the Action did accrue within 6 years & he may shew the Facts in detail did accrue at such a time & he took out his writ at such a time — he may shew specially or Generally

by replication that the action did accrue within 6 years.

99. On Replication, is inseparable of the two pleas — and the mode for the Pltf in reply is .. by alledging any facts which brings the case within the saving of the Statute .. he may reply that the Debt was a Crue Crt .. an Infant or beyond sea.

100. This last clause in the Statute is a substantial reason why the Statute should always be plead specialy 1 Levins 110 3 T. Rep 662 Wiles 27 .. Strange 836 .. 2 Mod 71 .. 1 Atk Rep 268 ..

101. And when it is necessary for the purpose of bringing his case within the saving of the Statute he may vary the venue i.e. vary the Plea and it is no departure. he must bring his case under a videlicet as a mere fiction ..

E.G. Suppose a Lessee is sued in London upon a promise made in the City of Paris. The Declaration says "at Paris in the Kingdom of France then and there spitt promised &c to wit at London in the Parish of St Mary la bone in the ward of Cheap &c .. here if the Defendant makes the Place materiae & the Plaintiff wishes (to) and pleads the Statute .. and the Plff wishes to take advantage of the saving clause of the Statute, he may vary the venue as laid at London &c and prove in the City of Paris.

Judges are to be supposed as having no knowledge of Geography
1 Levins 143. 10 Mod 348 —

102. Precisely the same principle applies as to the time laid in the declaration when it is by mistake laid at too remote a period

E.G. Suppose the action is brought in 1824 and the time when the promise was made was 1820. but by mistake the promise is laid in 1800 the Plff may prove the true time of the Promise 1 Levins 110 - 143 Cro Car 214 - 1 Strange 21. 10 Mod 341

The principles of Both rules is that the day and Place are immaterial — But with regard to the time some Authors say the day is immaterial unless specially demurred to. but this distinction is not now made and it would make no difference if Specially demurred to —

103. The question has often been debated and discussed and decided in this State. whether in case of a new promise after the original promise is made. whether the action should be brought on the original promise or subsequent one in this State it has been held that an action may be brought either upon the original or subsequent promise —

The jury of the Pla must decide this question.

104 The action is Engd is brought on the original promise and

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says his Hon.ble Court" I conceive it can ought to be so brought.
Because in the first place if the action is brought on the new promise the declaration would be special. for the original contract must be stated as the consideration of the special promise afterwards made. — How would it be possible to declare upon a special promise when it is an implied promise arising from a new acknowledgement? further we find a new acknowledgement to a third person will take a case out of the Statute. How could a Court be founded on this acknowledgement to a stranger. so again it is decided that a promise after suit is brought takes it out of Statute Now in such a case it is inconsistent with the nature of things that here the action can be founded on the new promise.—

105 Under the Statute of 21 Jam. 1 all actions on case, except actions of Slander. Actions of Account. of Trespass &c. Actions to recover Goods (I would say) property. Debt on Simp Contract. Detinue & replevin are limited to 6 years under Assumpsit — actions of Ass.t & Battery are limited to 4 years. to false Imprisonment. actions of Slander 2 years and entry on Land 20 years.

106. But in Engd there is no limitation of actions as Specialties such as Debt Covenant Broken and actions

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on Bond single Bill. though no time is limited as Special. -ties yet after the Elapse of 18 or 20 Years there being no Payment or recognition of the debt within the time the Jury will presume Paymt.

III. Accord and Satisfaction

The next plea is accord and
1. Satisfaction — accord executed is a good plea to assump- -sit, as to almost all other actions Esp Dig 147 or 279 — Chitty on Bills 198 1 Powell on Con. 451 2 Ray 153 —
2. The term accord denotes some kind of an agreement but in the Present instance means giving or accepting some collateral Satisfaction for some claim
3. Accord is an agreement. The Satisfaction is the
4. performance of that agreement 3 Blk 15 = It is agreed that accord and satisfaction may be pleaded specialy but whether it can be given in evidence under the general issue the opinions are contradictory. the weight of Opinion is in favour of the position. and on principles of discrimination it can be done — the effect is not to suspend or debar the remedy but to extinguish the indebtedness the defence consists in the satisfaction of the claim, not destroying the remedy but destroying the demand 2 Ray. 566. 1 Ch Plea. 472 12 Mod 376 —

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Com Dig. accord Ft. - 4 Esp 181 — 15 East — 230 — 1 Salk 135.

5. An accord not executed is no defence to any action whatever Esp Dig 147 & 279 and 280 — 9 Coke 79. B. 1 Salk 135

6. But this rule that accord not executed is no defence as applied to sim. Contracts must be confined to cases when the right of action has accrued before the accord. for in cases of simple Contract before right of action have accrued they may be varied by the mere parole agreement of the parties — after right of action has accrued it cannot be discharged except by release Cro Car 383 — 4 — 1 Pos. on Con 412 — 13. — Esp Dig 157 —

7. This defence is pleadable to all actions on simple contracts and to all personal actions for damages 6 Coke 44 Cro Jac 100

8. But to make the defence Mutual the accord must have been fully executed. part execution of an accord with a promise of performance of the rest or even a tender of the residue is insufficient Esp Dig 230. 2 Part — 1 Ves. 67 1 Salk 135. 9 Coke 79 B. 2 Y Reb 74 as to tender of residue Esp Dig N.Y. ed 280 — 2 Hen. Blk 314 3 East — 251. Strang 426

9. — — This last rule amounts to this. that a new contract alone, cannot be set up in bar of a former one of the same kind a mere accord is nothing more than

the substitution of one agreement for another —

10. A contract given of one kind cannot be construed against another of the same kind unless it be greater & more strong than the other - not having reference to accord & Satisfaction — e.g. — Now if A holds a Note against B. of $100. payable 1 Dec. 1820 and B. gives another note for the same consideration payable at the same time and then this latter Note cannot be given in evidence to bar a recovery on the former - the Pff cannot recover on each. yet is entitled to recover on the first if he so elects Hob 58 — Cro Eliz 727 —

11. One Executory Contract given for another of the same kind is no satisfaction unless more advantageous to the creditor and does not destroy the former. 4 Coke 79 B. 1 Selw 135 —

12. Where a Specie deed for simple contract is given the simple contract is merged in the Specialty. this is mentioned for sake of Contradistinction

13. It is apparent that accord and Satisfaction cannot be admitted where both contracts are the same. the substituted must be better & more advantageous to the creditor than the other Cro Eliz 727 Hob 58. Esp Dig 230. —

14. This defence requires a complete Satisfaction. The sat-

-isfaction must be agreed upon & accepted, it must be a valuable one —

15. It has been held that an Equity of Redemption was no Satisfaction though so agreed between the Parties — Because it is deemed of no value —

E.G. A owes B. $1.000.00 i.e. One thousand dollars and A has land under mortgage. his Equity of Redemption is worth $10.000.. The Parties agree that B shall receive A's Equity of Red.n in full satisfaction of his demand. this is not Satisfaction and cannot be pleaded as such 2 Wils 86 Eth Dig 230 2 part N.Y ed 67. Littleton Sec. 332

16. The other requisite is it must appear reasonable or Truth that it appear not unreasonable & it must be complete. & therefore when a Contract is for the payment of $100 a payment of a less sum is no satisfaction

17 C — — E.G. Suppose A owes B. $50 payable at a certain time and place and the Parties agree that payment of $49 shall suffice & this agreement is performed at the stipulated time and place. yet it cannot be pleaded as Satisfaction. the reason is the Court will judge that the $49 cannot be a satisfaction for a greater sum being inconsistent with the nature of things Eth 230 — 426.. 2 John 448. 2 Y Rep Rep is not Law &c

18 The Court cannot enquire into the value of the satisfaction when it appears not upon the face of the Pleading - in cases of money &c when the sum is incapable to the money due. But where any specific article is given and accepted as a satisfaction for any ant. whatever due this is a good bar & the Deft may avail himself of such a defence though the article accepted is of small value —
9 Coke 79 — 3 ibid 97. Esp Dig 230. 2 Part - 67.

19 Payment of a smaller sum of money before the larger amount become due. and accepted in Satn may be pleaded in Satisfaction. —

20 So a smaller sum as $5. may be pleaded in bar of a greater sum if paid at a different place and accepted in Satisfaction. 2 Leevins 31 & 81 — 3. Coke 117. Esp Dig 147 & 283 - 230 - & 2 Part - 67. 4 Mod 88 —

21 It is said that accord and Satisfaction is not a good plea to a Bond 1/21 - it is agreed that it is a good plea as to money due by the contract - on the Bond — the reason given is that money due by contract can be discharged by collateral satisfaction. whereas a Bond is a specialty and can be discharged only by matter of as high a nature. This rule of distinction relates to nothing except the form of pleading. when it is not pleaded in satisfaction of the Bond but of the money contract & debt due on the Bond 6 Coke 43. 2 Mod 86. & 3 & 5 Coke 117. B Co Jac 254. 650. 1 Bow in Con.

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22. 426 But it is said that the accord and satisfaction must be before the Breach of Bond. for after the Bond becomes payable nothing but a discharge by deed can bar the Bond — Cro Eliz 46 .. 193 .. "The Distinction is an artificial one: doubt whether it would be observed in this Country/. 2 Wils 376. Coke 43 — The Rule referred to has never been adopted in this State and Acc^d & Satisf^n may be pleaded as verbally made to the most Solemn Contracts.

23. It is laid down as law that in case of an action on a deed for any thing except money Acc^d & Satisfaction is in no way a good defence. as where then is an allegation payable in money. Acc. & Sat^n is a good defence. yet if the obligation is for the delivery of 100 Bushels Wheat. here Acc^d & Sat^n could not be pleaded. the reason given by Coke is considered by Gould as "a strange doctrine."

24. The Plea must always that the "Def^t paid and delivered such property in full satisfaction & that the Pl^ff accepted the same in full satisfaction — alledging the delivery without the acceptance & so e converso. would be insufficient there must be a delivery on the one hand and an acceptance on the other Strong 1573 3 East 251 .. Esp. Dig 229 Part 2 .. 46 — 7 — The modern and safer way is to plead not by way of accord. but by way of Satisfaction for to adopt the former —

undangers the Pff in case of variance. It is not the proper way to state all the Particulars of the accord but without stating the particular terms of the accord. State that the Pff. dept delivered and Pff accepted in satisfaction — Strange 573. 9 Coke 80. — —

25. A Breach of an accord on either side. whether by the Creditor or Debtor is no ground of action for accord is no ground of action unless completely executed. the Policy of this rule may be questioned. says L.C. But the rule is firmly established. the Ct consider that accord is the substitution of one agreement for another. 2 Wm Blk 317. Ld Ray. 122 1 Salk 157. 5 East 230.

26. Accord and Satisfaction will not in any case support the Plea of Payment — and so e. contra. Payment must be pleaded. payt is a literal performance of the Contract; Acc. & Sat. is a Collat. Satisfaction. 1 Roll 75 — vide post. 121. Sec. 23. & vide p. 147. Sec. 28.

27. It has been decided that actual acceptance by the Pff in satisfaction of a Strange is no defence for the defendant. If A owes a debt to B. A cannot plead accord and Satisfn if B has paid the debt. A owes B. John Stiles purchases the debt. now A cannot plead the Purchase in satisfaction. for L.S. purchases a Chose in Action —

IV. Payment

28. 1. This may be given in evidence under non assumpsit. it may be pleaded specially Ld Ray 217. 566. 88. 9 Mod. 7. 87. 2 Burr. 1010 Bac Dig 147 or 280. Part payment is no defence it goes only

in mitigation of damages . or to diminish the amount of recovery Esp Dig 149-147 . & 280).

2. If a Vendor of Goods takes Notes or Bills of Exc. in payment — and the Notes or Bills prove not good it is no payment — unless the Vendor expressly agreed to take them upon his own risk & receive them as payment. This rule is founded upon the supposed understanding of the parties the Bills or Notes stand as security for the debt . 7 T Rep 64 - 184 . 6 ibid 52 5 Wils 513 . Ch on Bills 122 . 154 . 1 Esp Reps 3 . 2 Johns 68 . —

3. The Rule is the same where Bills of Exc. & Promi Notes are delivered in Consideration of Labour performed & as the means of obtaining payment of any other debt . 8 T Rep 451 . 3 East - 147 - 251 . —

4. This Rule does not hold in cases of Bank Notes for they are regarded as payment when genuine . for they are considered as Cash

5. — If a Creditor is induced by fraud to accept a note or other Instrument as payment and agrees to run his own risk yet he is not bound in such case to go considered it . for the fraud avoids the agreement . 1 Esp Rep 436 . 2 ibid 522 . 1 Com on Cont 98 6 Johns 110 ? At Com Law . payment after the day in an action on the Bond . from the day mentioned in the bond is no defence . for the penalty becomes forfeited . But by Eng. Stat . 4 Anne Chap 15 payment after the day is a good plea .

7 . It is sufficient if the deft has paid the debt any time before action brought — Esp 225 or 9 V . 62 That defence by our Law is a good Plea .

Payment.

the Plea is called in such case "payt. post diem" — — — — —

8. When an obligation is made payable on a day certain (certain) the obligor should plead payt. "at the day" and not "before the day". Proof of payt. before the day will not support the plea of payt. at the day. B.N.P. 171 Strange 994 .. 2 Burr 944. 1 Blk Rep. 210. 2 Wils 150 .. 173. Esp Dig 225 or Vol 2 .. 62. — first reason of this rule is. that payt. before the day is no performance of payt. at the day. acording to the terms of the contract. If Deft. was allowed to plead payment before the day. this would ensue. that if the Plff traverse it and verdict is found against the deft. this verdict would not decide the right in such case. —

9. If an Obligation is given for payt. "on or before" the day. in such case the Deft may plead payt. "on or before" the day. for payt on or before the day is a strict performance of the contract. therefore it is impossible for the Plff to object to this plea — —

10. But still the Plff must not merely traverse the Plea. but must state that the deft has not payd either "before, on, or after" the day. If the deft does not traverse by this form he does not shew with absolute certainty that it has not been paid (same authorities)

11. When payment after the day is pleaded. the plea must allege the amount payed & that it was the whole sum due with Interest. for Interest always runs after the time of payment specified. Esp Dig Vol 2 Part 63. If there are different debts due from one debtor to the

same creditor the debtor can apply the paym^t to which he chooses and the Creditor cannot controll its application. But if the debtor does not make the application the creditor may to which he chooses. It is the safest way for the Debtor to make the application in a case of two debts. for as not knowing to which the paym^t was applied he knows not to which he should plead paym^t Strange 194. 1 Vern 67 2 P Williams 308. 1 Selw 146-7 - Esp Dig 225 & 2 Part 65. In Equity, prevails a Rule of qualification. for if a Debt 13 two distinct debts one drawing Interest and the other not. and it makes no direction as to the application of the money paid. it will be presumed that it shall be applied to the debt drawing Interest 1 Vernon 24. Esp Dig 228 & 2 Part 65 —

13. If the Jury before whom a debt is due by specialty if they Learn the paym^t & promise for 18 & 20 Years the Ct will direct the Jury to find no debt. this is mere matter of evidence —

V. Covenant is Made out viz.

"That the defendant at the time of the Contr-

1. -act made was a feme covert, but this usually given in evid
-ence under the Gen Issue — Concerning pleading Specially &c - is
2. Any Defence which admits the truth of the declaration may be
Specially pleaded even though it may be admitted under the Gen
- Issue as in the instance of Paym^t 1 Selw 134. 5 - 12. Mod 101.

VI. Infancy

Bankruptcy

1. Plea. is that at the time the debt was contracted the Defd was an Infant, th. is Plea may be pleaded specially or given in evidence under the Gen Issue. 2 Lewis 144 1 Selw 138.

VII "Bankruptcy in the Plff"

1. When the Statute of Bankruptcy exists the Defd may plead the Plffs Bankruptcy where the debt was due before the act of Bankruptcy transferred the debt to his commissioners — but when the debt is transacted after Bankruptcy. then it is no defence.

2. But N.B. 152 Erb Dig 156-7 — We have no Bankrupt-law in this State. "Bankruptcy of Plff may be pleaded specialy or given in Evidence under the general issue

VIII "Bankruptcy in the Defd"

1. If the Defendant becomes a bankrupt and obtains his certificate he may plead it in bar to all debts due at the time of taking out the Certificate or such as might be proved against him under the Commission. for all such as could not be proved, from them it is no discharge 1 T. Rep 544 — 3 Wils 262. 2 Blk Rep 764. Erb Dig 157. "Bankruptcy of the Defd must be specialy pleaded and cannot be given in evidence under the Gen. Issue. Ch. on Bills 198 — 1 Saund 283 N. 2.

The reason for this is the debt is not extinguished it remains in point of honour and the debt remains. becaus a subsequent promise revives the debt. Cow 544. 2 T Rep 765 2 Hen Blk 116 —

Assumpsit

Dagluy 182. 378. 501. Esp Dig 158.

3d. Acts of Insolvency are known to our States. How far an Act of Insolvency can bar an action brought to recover a debt due before the act of Insolvency has been frequently agitated with regard the constitutionality thereof - A Power is vested in Congress to declare an uniform system of Bankruptcy. S. Ct of U. S. have decided this power of Congress is immaterial as regards the Constitutionality of the local laws of Insolvency in the respective states. untill Congress does Establish such a system. there have been two or three cases decided on other points. viz that such local acts as discharge the person of the debtor is valid but if the act of a State Legislature discharges a debtor from all liabilities for debts contracted previous to his discharge as his surrendering all his property for the benefit of his creditors is a Law impairing the Constitution of the U. S.
4 Wheat. 122. 209. 6 ibid 131 —

4. The reason of this decision is. - the Law discharging the person goes only to the remedy. it is a part of the Lex fori - but a States Statute which discharges the debt or property does not only go to the remedy but to the contract and debt itself. »

4th Release

1st This defence may be given in evidence under the Gen issue or specially pleaded in Assumpsit & Debt. Debt and Assumpsit are the only actions in which it may be given in evidence under the Gen.

Issue 2 Burr 1010 3 ibid 1353. 2 Ray 566. 787.

2. The Replication denying the plea of Release is immediately the same as the Gen. issue to a Bond or other specialty requiring, that plea as the Gen Issue. 1 Selw 147

The Release must be alleged to be by deed for after an action has been brought on a particular Contract, there can be no release except by deed. concerning a parol Release and one by deed sufficiently has been paid. for when a Release is pleaded it must be pleaded by deed Esp Dig 308. 376 of Wilm 2 Vo. after a parol contract is broken, nothing will discharge it except by deed

3. The most general words in a Release are. "All Demands"

4. A Release in full of all demands will not discharge any demand that may arise after the Release given tho it is a discharge of some debt or obligation which exists at the time 1 B. & P. 156 Ch. on B 13. Esp Dig 307. 8. Co Lit

5. 99 A Release of all demands to a drawer of Bill of Exchange not dishonoured yet due. does not discharge the drawer till the Bill is dishonoured for then is no demand against the drawer until the bill is dishonoured 2 Ray. 65. Esp Dig 308.

6. A Release given after action brot is a good defence to the action. Most defences after action brot being given, cannot be pleaded to the action. tho they might have it before action brought as for example. Payment Yelv. 141. 3 T Rep 186. 4 East 507

7. Plagin! after day of payment is no defence at Com Law. A Release discharges the breach itself

8. The sweeping words of the Release are "all demands" are sometimes restrained.

9. When a Release recites one particular demand & it then followed up by words "in full of all demands" the latter words are restrained by the particular demand

10. If a man receives £10 and gives a rect. whereby he discharges the debtor from all "debts duties and demands" yet he will but release his claim as the £10 and no more for the last words are limited by the foregoing. Hob. 74 2 Ray 255 663. 1 Rowm Ca. 377. 388 to 392 3 Mod 277. these words "all demands" in. terms subsisting rights of action and also what are called debts "debenti debiti" in "presenti solvendo in futuro"

11. A Release of "all demands" does not release a Bond conditioned for the performance of covts., before the condition is broken. Hath. 513 2 Ray 518. 522 Litt. Rep. Sec 508. 5 Coke. 70. Ch. on Bills 84. It does not discharge demands that arise in future

12. A discharge by act of Law, as under the Insolvent Laws, will never discharge as between Joint-debtors, any other but the Insolvent. But a discharge by the act of the Party, as discharging the Insolvent will discharge both debtors & all the Joint-debtors. the reason is the act of Insolvency is intended for the sole benefit of the Insolvent and no other 8 Mod Rep 168. 171 2 Ray 690 Comm. 139 Salk 574 Esp Dig Vol 2 308 3 Camp. Rep 4 ——

10th Defence is that the Defendant (has given the Plff) has given the Plff a Bond or other Specialty for the same debt or claim in demand that is pleadable in bar to either Assumpsit a debt or simple Contt for the Specialty is of higher nature than the simple Contract 1 Burr 9 Esp Dig 141 164 281 Bul NP 155 Com 129 Ch on Bills 62 189

2. But this action is not barred by a bond given for the same claim or debt by a Stranger. If A gives A Bond to B for a simple contract debt. This bond is pleadable by A. in bar to the Simp. Cont. by but if given by the Stile to B because cannot plead this bond in bar.

3. The Bond given by P.S. is a collateral security But from A it is the payment of the simp. Cont by one of a higher nature and it would be unjust that B should hold the Bond & Simp. Cont against A. and A liable in both. 1 Powl on Cont 423 Dyer 233 6 Mod 176 Esp 190. This defence may be given in evidence under the Gen Issue and Spec. pleaded. The bond extinguishes the debt but does not destroy the declaration.

Then is another defence analogous to this. which is

11th That the Plff has recovered a former Judgt in a quasi the Deft for the same cause or thing in demand, this may be pleaded specially or given in evidence under the Gen Issue. in All other actions it must be pleaded specially

12th Defence is. That the Plff has brought a prior action

assumpsit

against the defendant for the same thing and the (Plff) Defts has recovered his cost or the Plff has lost his case.

2. The Judgts operate in this case different from in the other, when by Judgt the Plff had obtained satisfaction. But in the case of the defendants having obtained his case operates as an estoppel to the Plffs recovery 1 Dy 140. 2 Bl. R. 827 1 Chit Plea. 170-171.

3. But a former recovery by the same Plff in the same Court upon and on distinct ground of action those connected with the Present is no ground of defence and cannot be pleaded in bar.

E.G. If A represent John Stiles as a man of Property an good credit to B and knowing that he is not. Now though B. brings his action on B. for his fraudulent misrepresentations yet he can have & maintain an action on J. Stiles for the debt and John Stiles cannot plead the recovery from B. in Bar to a recovery from himself 3 Esp Dig 2 Rep. 208. 13. A. 767 Peakes Rep 124 Peakes Ev. 172 1 Day 122.

13th Issue is an award of Arbitration deciding the merits of the case. The Award is contrary to the matters of a Deed. It may be pleaded specially or given in evidence under the Gen Issue the same rules in the two former pleas apply here (Vide Authorities)

14 Fondle before action No 15. of the debt or duty for which the action is brought this cannot be given in evidence

Tender. Bringing money into Court.

under the Gen. Issue but must be specially pleaded for a tender discharges not but goes to the remedy. a tender discharges not the debt The debt remains after the Tender has been made Ch on Bills 198 1 Saunds 33. 2 Then are but few cases that involve so many Cloth case, points and intricacies as Tender.

A Tender is an offer to pay the debt

Bringing money into Ct. 5 Bac Abr. Tit. tender. 1

1. Then a many cases in which the Deft brings the money into Court under the permission of the Ct. How the effects is the same as in the case of tender. Bringing money into Ct. is meant meant depositing money in the Court into the proper Office for the satisfaction of the debt a duty for which the action is brought.

2. This has been introduced in modern times to supply the place of tender. either when tender has been omitted when it would have been effectual or where if it had been received would have proved ineffectual. 7 Bac Abr. Gen. Ct. Stra 787

3. The Proceeding of Bringing money into Ct. in pursuance of a plea of Tender is entirely different from the Proceeding of Bringing money into Ct. in pursuance of a rule of Ct. or Stat. Provision. for in the former case when the the money is brought into Court it is a matter of right but in the latter an indulgence by Ct. is allowed by Stat as in case of Ejectment by mortgagee vs Mortgagor And then other cases by Stat of Eng.

4. But Generally Money is not into Ct. by the virtue

of the discretionary power of the Ct. under rule of practice. Com. Dig. Plea 2. N. 28.

5. The effect of bringing money into Ct. under rule of Ct. is that the Court will order the action to be stayed and generally put to end to the suit

6. The ordinary Rule of bringing money into Ct. is that the money be stricken from the (docket) declaration and the Plff. is not allowed to give in evidence on trial that amt. unless he proves more than is brot. into Ct.

7. This leaves the Plff at his election whether to proceed in his case, he can if he pleases and demand more than has been paid into Ct. Bac Abr tit. Tender. 10. 5 Bac Abr. tit Tender 1 - in the Introduction -

8. What is meant by striking the case off the declaration is this. that if the Plff. chooses to continue and does not recover more than is brought into Ct. he fails in his action -

9. In General, money may be brought into Ct. under the General Issue, in all cases in which Tender would have been a good special plea. this the general reason why money is brought into Ct. under Com. Rule. but there are cases which come under the Stat. 5 Bac Abr. Tender N. 26 -

10. This practice of Bringing money into Ct. under Rule of Ct. has never been adopted in this State. I think it would have been had it on instance occurred that would have required the interposition of the Court -

11. The party making a tender must always declare at the time on what account or claim he wishes it to apply

Tender,

If he does not, the tender is not good. for the Pff does not know for what purpose it is paid. he may insist it a Dft — Leach 7. 2 Wils 74. 1 Selw 174.

12. Indeed in order to make an effectual tender there must be an actual offer of the money — merely stating a readiness to pay, is not sufficient — though the debr holds the money in his hand. Bac Abr tit. tender. B. 1. 2 Lewis 209 3 Ibid 104. 12 Mod 353.

13. But an actual offer tho it is a Day, & Dft. tho not shewn to the Creditor, is sufficient. for it is the duty of the Creditor to count the money 5 Co 115 Co Lit 208 Esp Dig 200. Bac Abr. tender. B. 1.

14. If there are several debts due to the same Creditor the Creditor may apply it to either at his own discretion as in case of payt. Bac Abr. Tit. tender. B. 1. — vide 3. P. A.

15. It has been determined that a tender of more than is due is good, because, says coke, more may be contained in less sums. This rule is qualified

16. The Rule is, if more is tendered than is due and the Creditor does not object to it being too much, He may make this objection if he does the tender is not valid. The Creditor must if the.

17. The Debtor must, if the Creditor requires it, tender the exact sum. without asking for change. It is the duty of the debtor to deliver the exact change 5 Cok. 115 Stra 916. Bac. Abr. tit. tender. B. 2. See the rule as qualified Peakes Ev. 258. Peake Rep. 88. 179 — 1 Selw 171-2.

18. If a person is bound to do one of two things at the

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election of the Creditor as to pay £100 & deliver a Yoke of Oxen. here unless the Pff should elect the debtor must make a tender of both to make it effectual.

19. But on the other hand when the person is bound in the alternative to do one of two things at his own election, he may, may tender but one of the two, Bac Abr. Tit Ten. B.

20. It is laid down as a rule that a tender of any sort of money made current by law is good as regards the subject matter —

21. A tender of foreign coin made current by law is good, Leach 84. Salk 446. Cumberbank 387. Esp Dig 161 or 300

22. In this Country at this time the power of declaring what shall & what shall not be coin is vested in Congress.

23. It has been supposed that Copper cents were a good tender. It has been decided in one of the United States that such tender is not good and so "I conceive" says "P. P." for it is almost as cumbersome as Bar Iron and would subject the Creditor to great inconvenience —

24. A tender of Bank Notes is good if not objected to as being not cash and this must be the sole objection. for If he makes no objection he waives all objection.

25. No Creditor can be compelled to receive Bank Notes in tender.

26 Bank Notes are frequently (are frequently) regarded as

Tender.

Cush. 3 Y & R 554. 6 Bosanquet & Puller 526. 1 Eq. Cases 318. 5 Bac. Ten. B. 2 Pickes Ev. 258.

27. It has been decided that a tender of Counterfeit coin is good if excepted by the Creditor. This case supposes each party, the Cred.r & Debtr, equaly ignorant of the counterfeiting of the coin. and that the Creditor should examine it at all events. and that it coincides with case of selling goods that are damaged. & both parties are equally ignorant of it. Co Lit. 208 Bac. Abr. B. 2. Shepards Touchstone 1407. 1 Ld Ray. 743 or 1743.

28. A case is in Strange, where the rule is extended to Bank Notes.

29. In this Country no case can be found as to counterfeit coin, but as regards Bank Bills Counterfeit If A pays B a Counterfeit Bill. it is no payment 2 Johns Cas, Rep 445 6 Mass 182.

29. If Bills of Ex are forged and payed for a debt the payment is not good unless the Creditor assumes the risk upon his own shoulders. Engl. distinctions between securities and money vide 7 T Rep 64. 1 Esp Rep 3. 7 T Rep 64. 2 Johns 68. 5 T Rep 513. 6 ibid 52. 7 ibid 46.

30. There is certainly a difference between payment in securities and forged coin. for Genuin Bills of Ex are not payment unless the Creditor assumes the risk. In this State. by Statute payment in Counterfeit coin or Bills is bad.

31. If a Debtor makes an offer to pay the Creditor, and the Creditor insists that more is due, than the debtor is ready to offer, then is no necessity of making an

actual offer (in such case) This seems to be an exception to the gen.l rule. Mass 88. Peakes ev. 259, 4 Esp Rep 67. Esp Dig 161 & 300. These are all Nisi Prius decisions an form a very comprehensive exception to the gen rule. I doubt whether these Nisi Prius decisions will be regarded —

32. An Offer to pay a debt on condition that the Credr will give a Recpt & release and not otherwise is not a valid tender, unless the terms of the Contract require a receipt & discharge, which would be a very unfrequent case.

There is no Law requiring the Creditor to give a receipt & release unless the terms of the contract require it P. Rep. 179, Esp Dig 161 & 300

33. It. offer must be at the same place B. Abr. Ten. 6 4 Let 210 & 110

34. When the condition is for the payt of a sum of money and no place appointed a tender must be made to the person of the Creditor when he may be found unless he has left the Realm. But a debtor is never bound to follow a Credr out of the State. for as this State giving out of the State is the same as going into Eng. Com. Dig. Com. G. 10 Lit. Sec 340. Co Lit 210 —

35. But Rent issuing out of Lands when no place of payt has been made. a Tender upon the Law day is sufficient as to this person. Without a sum of money in Esp & the term groß is in contradistinction to Rent Bro Ten 48. 3 Bac Abr. Tit ten. C. Co Lit 210.

The Principal that the tender cuts the action &

Tender

on the Land is that Rent is part of the produce of the Land and issueing from the land and as it was usual to pay rent from the produce of the Land &c but if a place is appointed the tender must be made at that place — — — "Bulky Articles" — — —

36. When bulky Articles are to be delivered and no place of performance is mentioned it is the duty of the Debtor to enquire of the Credr where he shall deliver them and if the Credr appts a place attendance at that place is sufficient. bulky Articles cannot be transported with the Debtr nevertheless it is convenient for the Credr to receive them at all places. Bac Abr. Tender C. Co Litt 210 But if no place is appointed by the Credr that must the Debtr do? — Cursus curiæ — no case in Law can be found where Cts of Law have decided this question But it seems consonant to a Rule of Eqty that if the Credr appoints no place and refuses to, the Deftr may and give notice to the Credr at his usual place he will deliver them. I do not say that is Law. but such rule would probably be adopted as in a Ct of Eqty" Tenn. Digest. Tit. Tender. Co Litt 210 & 4 Leon 16. The Rule is not precisely laid down but a conclusion I have drawn from the case

37. When one is bound to deliver Bulky Articles as Corn Iron Wine &c. a tender duly made discharges the whole debt duty & obligation. what becomes of the articles after the tender there is none of his concern 9 Co. 79. Co Litt 201. 2 Roll 524 Bac Abr. Tit. This latter conclusion goes to specific articles

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of any kind. No such Rule is needed in Eng. they [illegible] use to specify articles

both as the Rule has been adopted. to which I concede that where the payment is any thing or article except money, a tender at the time and place of mentioning such article is good and forever discharges the duty and obligation. be the article a Gold watch or an engraving. 1 Root 55. 64. 198.

Time of Tender and its effect

1st. D — — Tender after action brot is no defence at Com Law. for tender when effectual goes only in Bar of the act goes only to destroy the Plffs right of costs after act. brot; tender is too late 8 J Rep. 629. 1 Bos & Pul. 391 — 1 Selw. 173, 4 Bac. Abr. Tender (B) D.

2. Then is no occasion for the application of this rule when the time of performance is mentioned in the Cont in which case tender before act. brot (i.e.) a after is not good

3. But in Equity a tender after Bill is filed is good & must be of Contr as well as debt. Bac Abr. Tender B.

We have adopted in this State a Rule. that tender after act brot is good if made with the then existing costs &c — —

If money is to be paid a good delivery on a certain day (i.e.) Date is due for that day is no more a ground for plea of tender than Payment after the day. neither the one or the other will because for payment must be on the day 12 Mod 530. 533. 5 Co. 114 Co Elit 19. as to Tender after day Bac Abr Tit. Tender (B) 225 & 2. 63. Ab.

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5. But when money is by contract payable or to be delivered on or before a day mentioned in the contract a Tender on any previous day is good as well as at the day, for a delivery and acceptance at any time is a performance Stra 494. 1 Bal 174. 2 Bur 944

6. If money or goods are to be delivered at a certain place on or before a certain day A tender at that place on any other day than the one mentioned is not good unless the Creditor attends to receive it, because the Creditor is not bound to attend on any previous day either according to Law or Justice 5 Co. 114. Co Elic 211. Pro Elic 14. 12 Mod 421 - Comyns Dig. Ten. D. 8 and 9 -

7. If a debtor knows that the Creditor will not receive the money or deliver on a certain day, it would be and is doubtful as to the validity of the Tender. Bac Ten B. 12 Mod 422

8. But when the Con! is to deliver goods or pay money on or before a certain day. A tender upon the last day limited is good tho the Cred! is not present for when the last day arrives it is impossible to inform the Cred! after the day has expired Co Lit 202, 211 - 5 Co 114 2 Com Rep 69, Bac Abr Ten D.

9. But when the Cred! neglects appearing on the day appointed a tender made in his absence is not good unless made at the most convenient time of the day; That is at the latest period of the day which would allow the Def! sufficient time to

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to receive and count the money & examine the goods
It must be before sunset, as fixed by the rays of the
setting sun. The precise time is not nor cannot
be ascertained by Law for if the Million of money were
to be counted it would require much longer than
$1000. Co Litt 202, 5 Co. 114 3 Leo. 104 Hut 177. Salk 624

10. But there are rules laid down
as regards Inland Bills of Exch^g. The Party is allowed to the latest point of the day in which to
make payment till 12 o'clock at Night — 1 Saund 287. 4
T. Rep. 178. Ch on Bills 153 The Rule is doubted only as to Bills
But it seems well settled. This Rule with regard
to Inland Bills of Exch^g is an exception to the Gen Rule
of the Law. The Rule is limited to Inland Bills
of Exch^g not to Foreign Bills of Exch^g. This Rule as to
the allowance part of the day does not apply when
the Parties meet at an earlier hour for a time
in such case it is good Co Litt 202, 211 3 Co. 42. Co Litt
14. 5 Co 114. Comm Dig Plea. G. 8 and 9.
When it was part of the Rule with reference to meeting at
an earlier hour, for it is established that neither of them
may be obliged to appear earlier
That the General Rule of the Parties appearing admits
of Exceptions —

11. If from cases not within the control of the Parties, in
such a case if a tender be made to the attorney
convenient time of the day, in which it may
be made, it is a good tender, as in Case of Bk.
notes or Promissory Notes in such cases

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Tender at the utmost convenient period of during trump
Stran. 777.. Thom Ray 688 12 Mod 533 Bac Abr tender B.
If the place of payment is made but no time appointed
the party bound on giving notice of payment a partic-
ular day, to come may make a valid tender on that d
ay at that place. even tho the Creditor be absent, this m
ust be at the utmost convenient time of the day. Co
Lit 211. Bac Abr Ten. D. The rule is the defendt may
make payment any time during his own life 10 Co
92. But in the last case if the Debt. can bind the Cred.
he may pray time. provided the Cond is for the payt
of money Co Lit 202. 211, 5 Co 114. Cro Eliz 10. —

12. But if no time
& place is mentioned in the Cont how can the Deb.
buy in the Creds Absence no certainty of a Tender
can be found in the books on this subject — only
in Eq., when if the Debr appears beforehand at reasona-
ble time and place, and makes a tender in pursu-
ance of the appointment it is valid., how whether this
Rule would be adopted I cannot determine
but it seems a reasonable Rule. Bac Abr. Ten. G. & I. 2.
Ben 11 Mod 378. 12 Modern —

1. As to the Consequence of a Tender In general, a
Tender does not discharge a debt a debt, Bro Abr Ten.
Tender discharges wholly discharging Costs, sometimes re-
tained in Body as discharging Damages sometimes
times Damages & Costs, The effect of the Tender of-
ten is merely the nonsuing damages and Costs
not the damages of the action 3 Bl Rp. 303, Y. & 285

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1 Lev. 209, Carth. 133, Com. Dig. Plead. 2 W. 28. Lawson 124. 1 Ventr. 21, 3 Mod. 21. The nominal damages are usually 1/ or 5/. Tho this is a general rule yet there are some exceptions.

2. Tho where without any existing debt or duty it make a Grant with Condition for the payment of a sum of money by way of Gratuity the Tender in such cases discharges the whole debt and Obligation, & Extinguishes all claim that the Plff has. Cro. Car. 554. 1 Co. 77. Cro. Jac. 245. 1 Bac. Abr. Tender & Co. Litt. 207. 209. cases differing from Cases of Gratuity Salk. 75. 3 Lev. 24. Cro. Eliz. 755.

3. But the Plff's right to Nom. damages & Costs tho lost for a time, may be revived by a demand of a Plff and Refusal of the Deft or on such a demand and a neglect to pay the money. Hob. 267. 5 Bac 13.

4. Where a Bill draws Int. a Tender whilst it is depending the Int. But a subsequent demand and refusal will revive it. 5. Bac 13.

5. If the Deft prevails upon a Plea of Tender, and the Plff takes the money out of Ct. the Deft is entitled to cost. Bac Abr.
The Plff taking the money out of Court can make no difference.

6. A Tender as well as an Admission is good. Plea in other cases. In Gen a Tender is good in all cases of Contr where the thing contracted for is actual existence 5 Bac. Abr. A. & P.

7. It is not univerally true that a Tender is always good

Tender.

when the thing, a debt is in contract. a Tender of a penalty accrued by the breach of a (penal) penal Statute is no defence for no one is entitled to the Penalty until an action prosecution is commenced Bac Abr. 270 Letter O. That is such case under rule of Ch. the Defendant may tender the Penalty and in such case the Pros. will be stayed. Stra. 1217. Bac Abr. Ten. O.

8. The rule is, in all cases where money may be brought into Court. Tender is a good Plea & so e converso. That Bac Abr Ten O..

9. On the other hand in a Assumpt or Cov Broken. for uncertain damages Tender is no defence. The principle is a good one, per whole Court of Tender when the claim / damages are uncertain Stra 787. 2 Burr. 1120. 1 Bac Abr. Ten. P 11 Mod 275.

10 In action of Debt & Assumpsit Tender is always a good defence for in all actions of Ind. Assumpt the action is for a sum certain as for money had and received money paid and expended, for labour performed goods sold and delivered whether at a certain time or not Salk 23. 597. 6 Mod 128. 7 Bac Abr. Ten. (F) So also in debt on Contract for Goods Tender is a good Plea Salk 595.

11. (In Ind Assumpsit) Tender is a good defence for a Quantum meruit and Quantum valebant, Salk 576. It was formerly held that to Ind. Assumpsit for quantum valebant — quantum meruit, Tender did not be pleaded because the damages are uncertain Lo Ray 235. 12 Mod 187.

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The sum is certain, because it can be ascertained by the usual & market price — —

12. Where a sum to which the Plff is entitled can be made certain by computation, tender is a good plea.
But when the sum depends upon the Judgt & discretion of the Court then a tender is not good
2 Burr 1120. 5 Bac Abr. Ten. P.

13. Tender of money is not a good defence in an action on a Bond of Indemnity for the damages on presumption 12 Mod 596.

14 But there is a case forming an exceptn to the Gen
& Rule, a latter case which is allowed by Com. Law.
is in the action of Replevin for damages done by Cattle
Tender here by Com. Law is a good defence. & Tender
& sufficient amends. 5 Co 76 2 Chit Plea 521. 2. This seems
to be a peculiar indulgence allowed because the Trespass is involuntary.
But the depent should be careful to tender enough. — — — In Eng. by Stat 21st James 1st Tender
is allowed in an action of involuntary Trespass provided the Deft pleads with a disclaimer, & the Deft
must disclaim all knowledge of the Trespass and
right of Plff to title in Land. Bac Abr. Tit ten. P. S.
It is doubted under this Stat. whether Tender
is good in any other case except that of Trespass
done by Cattle. The latter opinions suppose that
he cannot — Stra 549 — 2 Chit Plea 521. 2. N. a.

15. It is a Rule already laid down that Tender is no
defence in Actions founded in Tort, as for damages

Tender.

are not certain. But in the action of Trover, the Deft may bring the money into Court under such rule tho' he cannot Plead Tender —

16. If Trespass however, the can be no tender, nor bringing of money into Court, for a sum of money — for the money is no rule of damages Bacon. 142. Bac abr. ten P.

17. ——— The reason why tender is allowed in Replevin, in the case of damage by cattle, is, that the Deft had a right to detain to prevent a distress of cattle ——— In the Court of Com. Pleas it has been allowed in one or two cases after rule obtained for the Plff to shew to the contrary, upon oath, to bring specific article into Ct where they were not Bailed

This Rule has prevailed not in the Ct of K.B. and I think it not practicable. Bac abr Ten P. 2 Barnardis 220. 229.

Pleading Tender

1. It. In Pleading this defence every requisite for its validity must have been alleged to have been complied with or the Plea will be ill. 1 Salk 624 Bac abr. Ten. H.

Hence in a Plea of Tender at the day appointed in the defendants absence, the Deft must allege the Tender to have been at the uttermost convenient time of the day, and when there is a conduit to pay the sum due applys & obtains. The Books do not mention that the Plea should be of the uttermost of the day but viz. "the Deft pleads" that at the place and on the day he was ready to pay & remained there ready to pay for the space of one hour before the expiration of the

time & duly limited Cro Jac 423. Salk 623. 624. 12 Mod 531. Stra 777. 833. Esp Dig 160. 299.

2. If the Plff was present it is not enough for the Defdt to plead a readiness to pay but an actual Tender Bac Abr Ten H. 1. 3 Lev 104. 2 Ibid 209. 2 Hil 74. Esp Dig 159. n 298. But if the Defdt was to perform at a time and place certain & the Creditor absent the Defdt need not allege a plural tender, but suffices in that to allege a readiness to pay and the Plffs absence. The Plffs absence must be alleged. If the Defdt pleads the Plffs absence, he must prove his tenders to perform. Th. 455 1 Ent 203. 2 Mod 286. Cro Eliz. 755. 1 Vin. 175. 4. Salk 622. 623.

3. So again when the time appointed for the Payment of the original Creditor was dead and no Representatives then appointed. It is sufficient for Defdt to plead a readiness to pay 2 Shower 143. 5 Bac 16.

4. — Unless the Defdt allege in his plea the Plffs absence he must already a refusal for the Defdts ready tender & return immediately 2 Lev 23 2 Lands 352. Cro Eliz 889. 2 Ventris 109. Esp Dig 160. n 299. 2 Mod 287. 969.

5. When a Tender and refusal discharges the debt as well as costs. The Plff should commence proceedings Judgt for damages only. This rule obtains when the Action is brot for debt, not sounding in damages — Co Litt 207. 9 Co 74. 2 Roy 254. Carth. 143. Salk 52. But

5 When the action sounds in damages as in Assumpsit then is a very different rule. The Defdt must tender by

Tender.

praying Judg.t "de ulterioribus damnis" 2 Roy 254. Sir Mo 623.

7. By Stat Anne, the Defd is allowed to plead one or more different pleas to the same action, But Gen Issue and Tender cannot be pleaded together i.e. together as to the whole or any one and same part of the demand, The rule given is that the Pleas are inconsistent. There is no more inconsistency in these pleas than the Pleas non est factum & pay not in a Bond 1 Bac 16. Barnes Notes 291. 110. The true reason I conceive is that Gen. Issue & Tender would require different pleadings as to Judg.t rendered, for the one goes in bar to the action while the other goes in bar to the damages running & cost. this is not the case in other instances of double Pleading.
The Gen Issue may be Pleaded to one part of the demand & Tender to the other. yet not both to the same demand. ibid Author.

8. But where the oblig.n is for the payment of money pleading tender & Refusal is not in general all that is requisite. but where it discharges the debt & duty Plea of Tender and Refusal is sufficient. 2 Rol 523. Cro Eliz 755 Co Lit 207.

9. After the Plea of tender and refusal the defendant oblig.n which is called a tous temps prist or an ever prist. The form that he has always been ready to pay, either one or the other of these Pleas the Defendant make, when the oblig.n is for payment of money 05 Bur 1619.

10. Where the Court is to pay immediately or at

the time of making the Cont. he must plead tous tempe. pris that he (has) always was & hop. been ready to pay. Bac. Abr. Ve. 3. Salk 622. 8 East 168. Esp Dig. Esp Dig. 159. 298 2 Ray. 254. Cur Ve 413. What is the am't of the defendants pleading that he was ready to pay: an averment of readiness to pay I conceive is consistent with all possibility of facts that a demand had been made and refusal of Deft. and when the Deft. Pleads tous tempe pris the Plff may reply a sub. demand and refusal between the time of Cont and Tender for after once offering to pay the Plff is not bound to accept a Tender 2 Ray 254 Salk 623. 12 Mod 153.

11. On the other hand when the Cont was to be performed on a subsequent time, it is sufficient to plead after Tender & Refusal, uncore prist. that he had always since been ready 2 Co Lit 207. Salk 623 2 Ray 254 Sidenham 30. In this latter Case the Plff may reply demand and refusal subsequent to the Tender. Hob. 207. 5 Bac 13.

12. It will be remem. that when Distinctions of pleading to Contr for payment of money, for in case of Bills & specific Acts. tender & Refusal is sufficient 9 Co 79 Co Lit 207. 2 Roll 524.

13. Besides tous tempe pris & uncore pris. the Deft. must still plead a profert in Curia so that the Plff might still have a Chance to accept the Tender Bac abr. Ve. 4 12 Mod 354. 2 Ray 83 254. 643. Stra. 638.

Set-off.

the nature of Pleading prevent recovery, if true the debt does not discharge the debt

14. But if the Defendant does not bring his money into Ct according to his Plea, his Plea is bad in a case in point of fact. Tho good in the face of it, and the Plff may sign Judgt against him for want of a Plea, Stra 633, 5 Mod Rep. 76.

"Sett" off

1st Sett off is not at Com Law a defence to this action or any other, for at Com Law, if the Plff owes the Deft as much or more than the deft does to the Plff yet he could not sett off his claim against that of the Plff but was driven to his action and in this way the Plff might have no visible property and thus collect from the Deft what the Deft could not collect from him, That there was a rule of Equity at Com Law. for the benefit of the Defts Esp Dig 238 a 2 Vol 75

2. And a Ct of Eq now prevails where the stat does not. In this State there is no Stat of Sett off — as to being Author 3 Bibb 304, 4 Mass. 143, Conn 56 & 3 Mass Rep 456, 2 Hen Bibb 440, 1 Ibid 657. The Authority for giving a rule Esp. 3 Vol Equity, 8 & 2 Geo 2, when mutual debts the of a different nature may be sett off at Law, prov they are due in the same right & if the action claimed by the deft is now due at the time of action brot, and not otherwise. (Vide notes p. 481.)

3. A Deft cannot Sett off a debt that has accrued after action brot by Plff for if it was allowed he might

Assumpsit

purchase notes. Bills &c. &c. and set them off against the Pltfs claim Burr 180 1 Esp 375. 10 ibid 418 1 Selw. 164, 166.

As this is a defence unknown at Com Law I shall dwell but shortly on it. N.Y. Stat p 24. Chap 9—

4. That the debt to be set-off must be liquidated and a sum certain this must both be certain If debt is due by one on a bond and by the other on a note they may be set off.

5. The same certainty is required in these cases with respects to debts as when Tender is a good Plea.

6. It is not sufficient that the debt due to the defendant is certain but both must be certain Comp 57 n 67. 6 T Rep 488. Esp 238.

7. Set off is no defence where either of the debts are to be ascertain'd by the verdict of the Judge & Jury as in cases of not performing Service or for injuries, Trespass &c. Comp 56. 6 T Rep. 488. 1 Burr 1024 1 Bl Rep 394. 2 Cranch 344. 2 Johns 150 1 Esp Cas 380. 4 ibid 207. A claim for remedy on an Open Policy of Insurance is not a subject of Set off

8. A debt to be set off in favour of Deft must be a subsisting debt at time of Action brot and one which in itself would support a claim, thus a debt barred by Statute of Limn. cannot be set off & the Pltf may reply the Statute of Limitations Stra 1271. Esp Dig. 234 n 339. 1 Bul N.P. 180. 1 Selw. 168. Lamer on Set 151 [illegible]

vide Stat. Lim. 21

Foreign Attachment

9. A debt to be a subject of Set off must be an absolute debt and not one created by portion of Law - 1 Esp Rep 83. Esp Dig 39 -

10. Both debts must be due in the same right; this is not universally true a debt due from one Partner cannot be set off as a debt due to the Partnership for these are not mutual debts 1 Selw. 167. Esp Dig 239 -

11. No joint debt can be set off against a separate one. those cases not coming within the Stat. 1 Selw. 167.

12. A debt due to the Debt in right of his wife cannot be set off agt a debt due from himself Bac. Ab. 179. 1 Esp Dig 239.

13. But a debt due to one Person as surviving partner of the firm may be set off to a debt due from him in his own Capacity and e converso, for he is entitled in one then case and liable in the other. 6 T R. 582 Esp Dig 240.

14. —— A Debt due to one party as Exec or Adm may be set off as a debt due from him personly and his own capacity. This is by express prov. of Stat. 1 Selw 168 Bac Ab 179 - Esp. 240. See the reason of this Rule 167. This must be a typographical mistake -

15. The Rank and degree of the debt makes no difference whatever by this Court a Specialty a Judg 2 Bac 1129 2 Bac - 2 Bl Rep 816 869. 3 Wils 396. 8 T Rep 69. Esp Dig 240. for a form of Pleading Set off. 1 Selw. & 1 Chitty.

Foreign Attachment

16. 1st This a good defence to the Action of Assumpsit or any other action. The Defence is — That the debt demanded

in the action has been rec'd of the Def't by a process of Foreign Attach'g brot by one of the Pltffs. creditors.

2. This defence is unknown at Comm. Law. In this Country it exists by prov'n of Stat. This Stat prevails in the N England States in Pa. & S. Ca.

Example. A of this State being indebted to B. absconds out of the State and leaves no visible property. But C. has left a debtor of his in this Stat. Now B may pray out a writ of Foreign Attach'g and garnishee the debtors debtor. The effect is to compell the Debtors debtor to pay the debt to the Creditor

3. The debtor of the absconding debtor, is called the Garnishee.

4. These Statutes are derived from the Custom of London. Stat of Conn. Tit-Contracts.

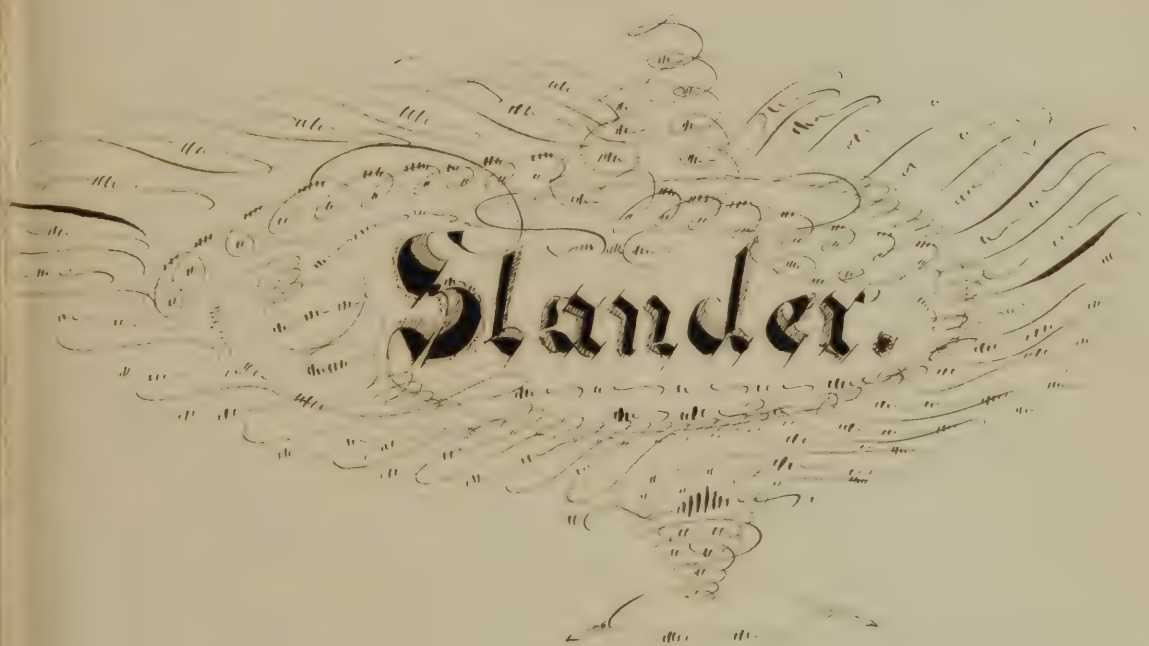
5. The Proceeding in Foreign Attach'g is thus. The Pltff in Foreign Attach'g has his writ of Foreign Attach'g against the absconding debtor and thereby obtained Custody of the absconding Def't's Effects in the hands of the Garnishee. Replication.

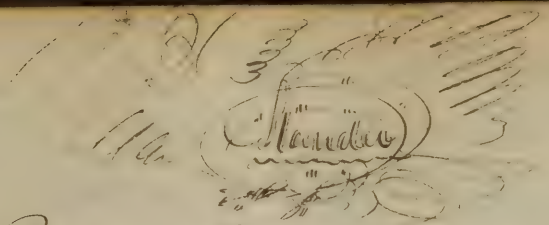
6. It is a good Replication to this Plea that the Def't has assigned the debt to some other person before the service of the Foreign Attach'g. 1 Root 63. for if the debt was assigned before serv'n of Foreign Attach'g the Garnishee must plead this. This Defence by our Stat may be given in Ev'n under the Gen'l Issue. In other Foreign Attach'ts and in this Plea ought to be given in Ev'n under Gen'l Issue at Com. Law.

There are two more particular defences which I shall class of under distinct titles. Award of Arbitrators and Usury

There are other defences which have been sufficiently treated of under the Title of Contracts.

Slander.





By the Person A.P. Title. relates only to the Person —

1st. Slander consists in the maliciously defaming another in his reputation that is, his reputation in some respect —

2. This wrong may be committed 1st — by words written or spoken, which tends to injure the person, personal security Connection, office, profession, and Interest) &

3. 2d The wrong may be committed by figures, emblems or any kind of picturesque representation tending to injure the Person, 4 Co. 14. 3 T.R. 123. Esp. Dig. 496.

4. According to the usual distinction, Slander may be divided into 3 Kinds — 1st by words. 2d by Writing & 3d By Picturesque representations, the Phraseology is not very correct — for words may be spoken or written

5. Slander by words is of two Kinds 1st Words actionable in themselves — 2d Words not actionable in themselves 4 Bac Ab. Slan. 483. 494

6. Rules relating to Oral Slander will apply to written Slander tho not universally true. The rules laid down under this head are applicable to written Slander, unless the Contrary is expressed (Slanderous words)

7. To render words Slanderous they must be spoken both falsely and maliciously. ie falsely and malice must concur.

8. In Law the term malice is of Comprehensive import for malice in fact — meaning ill will or malevolence to the party injured. A Act in may be guilty

Slander

of legal Slander from malice to another person, as if I am ill will towards A. and shoud defame his reputation & parent or other Such &c

9. All slanderous words must be actionable in themselves or become so by reason of some Special damage, In the first case the Plff may recover in proving the mere words, provided they are false. as to this the onus probandi lies upon the Deft

10. Where the words are actionable in se. the law implies damages & the Plff is entitled to recover, and this presumption cannot be rebutted, as a general rule the Law implied malice when the words are actionable per se. tho malice may in some instances be rebutted

11. The Gen Rule stands unimpaired viz, for actionable words the Plff is entitled to recover. Bul & P. 6. 1 Str Rep. 111-

1st of Words in themselves Actionable

1. There are 4 classes of words actionable in themselves
1st Such where the party of whom they are spoken is put in danger of Corporal punishment,
2d words which tend to exclude the Party of whom they are spoken, from Society
3d Words tending to injure one in his trade or profession
4th Words tending to injure one in his Office 3 Bulst 183 4 Bac 183. 1 Roll 83.

2. Words may be actionable per se tho they may not effect the moral Character of the Plff.

3. They may effect the moral Character and yet not be actionable per se.

Words actionable

Def" Words are actionable which tend to injure one, or endanger him to Corporal punishment.

1st" If false words charge a fact which would injure, or expose Punishment they are clearly actionable 4 Co Rep. Dir 638" 1 002 1 Mills 177" - 186" Cro Jac 114" 4 Co. 20".

2" Words charging an Offence which will subject the Party to Mans Jurisdiction, are actionable"

3" So falsely charging one if an Offence which would expose him to the Tumbler a Carting &c are ac" 1 Rolle 354 Bac 136.

4. Words charging another with an offence which would subject him to Imprisonment are ac" for Imprisⁿ or Corporeal Punishment 2 Salk 691" 2 Vent. 256. Cumberbeach". 3 Mills 186" Contra 2 Salk 696" But that is not Law for it is denied by Mills 186 -

5. Falsely charging one with any crime that would expose him to Crim. prosecution (Barg Espinasse, is actionable But he cites an authority Dennis pro vri Finches Law 186 - Esp Dig. 447" I consider this as not a correct rule, for upon his principle a mere charge of Trespass would be ac. for Trespass and is a breach of the Peace and expose the party to prosecution,

6. In this State our Cts have adopted the rule a distinction that words charging another with an offence that would subject him to a simple fine is actionable according to the Infamy of the Crime -

7. But in Connecticut, charging one with an offence against mere Statute Law, is considered as not infamous and not ac" But words actionable per se, must charge a criminal act

Slander.

Criminal act committed.

8 The false imputation of evil intentions is not ac. except in case of encompassing the King's death

9. When one said I expected to see John Stiles indicted for stealing is not ac. 1 Salmon 5 73 1 Roll 51 4 Co 16. B. Esp Dig 496.

10. When the words were "he is in Gaol for stealing a Horse," it was held these words were not ac. for the Construction of the Court was, That the Plff was in Gaol upon the charge of stealing and so was the Def to mean this seems to me not to be Law. the words are actionable 2 Wils 302 (a 306). Esp. Dig. 496. 497. vide

11. But it is a Rule that adjective words are or are not actionable according as they import the crime committed or not. If they are Seditious, Thievish, Traitorous are not slanderous and not actionable per se. But the word "Perjured" is ac. Perjured is a Participial adjective as for this imports a Crime committed, 4 Co 18. 2 B. 19 A. Esp Dig 497.

12. 1st principal of the distinction. The Law does not punish evil intentions it punishes overt acts.

13. Of impious intentions. Then is no punishment expressed but when the words imply an act committed, it leaves the Person to punishment.

14. But to say of a person that he is forsworn is not actionable unless spoken with reference to some Judicial Proceeding. The reason is, any false swearing not amounting to legal perjury is not ac. at Com. Law. Cro. Eliz. 609. 3. Leon. 166. 4 Co 15. Hence this has one decision very Many have and if uncontradicted to be Law to call one a Thief or a Felon or any guilty of any Offence

Words actionable.

words heinous after a Gen. Pardon, is actionable, tho he may have actually committed the Offence, a Pardon purges him of all guilt, 3 Bol 81 Hay 23 Esp Dig 497 2 Bull I conceive this rule to extend no further (extend no further) than a Charge of a Criminal Nature, for a Charge another of One having committed the crime is not actionable.

15. So Falsely charging one of having committed a crime, such a crime as a Man can be Slander, of what he shall be acquitted is actionable in se. tho he cannot be exposed to punishment 4 Bac 487.

2 But how reconcile this rule with the Gen. Rule - I answer that it is sufficient that if the Crime charged be of such a nature as to expose the person to punishment

16. But when words charge a crime committed when it appears that it could not have been committed is not actionable in se. Thus if at Days of 93. he murder John Stiles when John Stiles is living and seen daily as usual. Bul N.P. 5. 4 Co. 16 a. Esp Dig 498.

17. Falsely charging one with a crime for which all prosecution is barred by Statute is actionable. tho it no danger of legal punishment. It is sufficient if the Charge be of such a nature as to require a punishment. It would be no more than to say the person cannot be punished.

18. When words actionable in se, are spoken and admit of a possibility of their being spoken innocently the burden of proof lies upon the Defendant to prove them spoken with an innocent intent. Peake Ev. 4

19 When words are deemed to be actionable as importing an

Slander.

a fact punishable corporally it is a rule that if the punishment of the act charged is in the alternative the words charged is or is not according to the circumstances. Then the words are actionable according to those circumstances By English Law The Putative Father of a Bastard Child in case if the child becomes on the Parish now if the child is chargeable to the Parish. The Father is liable to be imprisoned. Here (if the father is accused) of the person is accused as the father in such instances the action is maintainable, but if accused when the crime would not subject him to imprisonment is not actionable. Salk 694. 4 Co 17. Cro Car. 315. 4 Bur 487.

20. Second class of Actionable words are such as tend to exclude a person from society. such as charging one with having a contagious disease a disorder. such is 6 Co. 20 4 Co 17. a. 3 Bulst 123. Esp Dig 498. Hob 214.

21. But words words to be actionable must charge a present disease or disorder, the rule was formerly otherwise as charging one with having had. But it is not the case now charged. But the tendency to exclude one from society 1 Wms 1189 2 T Rep. 473. Cro. C. 214. The rule as formerly here is laid down in Cro Jac 236.

22. Under this head adjectives words in the present tense are actionable tho not under the former head as a general rule as to say of a man "he is leprous" is Co. 12 Mod 248. Cro Jac. 144.

23. Third class of words actionable in se. are those which tend to injure the person in his profession or calling then falsely to call another who is a "Lawyer" a knave" is actionable not because it charges injures his reputation but because it

if injurious to his professional calling, his means of livelihood. all accords of this class are actionable on this principle 3 Bulst. 123. 1 Rol. 52. 3. 4. 2 Vent. 28. Esp. Dig 498

24. Upon the same principle falsely charging a Lawyer with any thing which would deprive him of his profession or office is AC. Thus the following words must be false. Cro Eliz 784. 382. 1 Levin 271. 297. 1 Sid 271.

25. In an action brought for words of this class by a Lawyer he must state in his Decl. that he was a practising Lawyer in point of fact. The Atty Gen has a right to prove himself, not a learned Lawyer as if at this brings an AC of Slander must for words touching his office, it is sufficient for him to shew that he was, & is acting in that office, then the Words forbade him upon the Act. to shew he is not a Sheriff duly appointed 2 Vent 28. 4 Term 16. 366. 2 McNally 487. Bubber.

26. Words to call a Trader. Bankrupt is slanderous actionable even words allowed in the future tense have been held AC. as "he will be a Bankrupt"

27. It is not actionable to say of another man he is a Bankrupt upon the Principle that every creditor is entitled to the countenance of trade. 1 Co. 19. A. 2 Term 762. Esp. Dig 499. Cartt 330.

28. And to charge a Trader with dishonesty in his trade or his profession is AC. The duty of another to chuse his customers is actionable. A Trader is one also known by buying & selling thereon a charge of want of Integrity & honesty is destructive to his trade 6 Mod 1480. 2 Lev. 62. 3 Bur 1688.

29. But in actions by tradesmen it must appear either by what is colloquium in his Dec. or by some other words

Slander

that the words were spoken of him in his trade & profession for if not spoken with that reference, they are not actionable. The Colloquium is generally stated in the declaration as follows "in a certain conversation concerning the Plff's trade, the Defdt falsely & maliciously uttered the following words, (meaning the Plff) in a cheat" 2 Roll Rep 1417. Salk 694 Show 696 Lev 69. Hayns 61 and 169.

30. Esp says where one charges a Gentleman in his business a Bankrupt, it is necessary to state in the Colloquium that the words were spoken of the Plff with reference to his trade and Calling — But this I conceive is not necessary. for there can be no Bankrupt except one who buys and sells either in fact or with reference to the Bankrupt Law. If the words are spoken of a Trader that he is insolvent, then the Colloquium is necessary.

31. To call a Clergyman a liar is AC. in this State. All words charging him with immorality is actionable, for Morality is essential to the support of his calling or profession. In Eng. it has been decided to charge a Clergyman with Preaching lies is AC. 3 Lev. 7. 1 Roll. 58.
To charge a Clergyman with drunkness is AC. to call him a rogue a knave is AC. Comyns. 253. Show 194. 4 Bac. 490.

32. Words implying ignorance in profession to a Physician as to call him a Quack is AC. to call him a Knave is not AC. for this does not injure him while in his profession. 1 Roll. 54. 11 Mod 221. Cro Eliz 520. In Cro Eliz it was held the words "he has killed a patient" is not AC. but if he was a Apothecary it would be AC. for it concerns the discharge of a good one in Gen. is actionable injury in his trade or profession, cited in AC. 1 Show. 898.

"Slander"

33. Fourth. Rule of words actionable in se are those which tend to injure one in his office under this head the rule is

That any words charging a person in office of profit either with want of skill or ability or integrity is ac. The principle is any words tending to injure the officer by means of libelous. That office must be one of profit 2 Ld Ray 1296. Salk 695. 684 500

34. But words charging a person in an office of trust or honour and not of profit, are not ac. because they do not tend to injure him in his livelihood. But state a charge of want of integrity is ac. To say of one. "he is a Bottle headed Justice is not ac. but to say he is a corrupt Justice is ac. Stra 617. Ld Ray 1369 468 Cro Eliz. 140 Stra 617.

35. Charging a person in an office of profit (any office of trust) with indictable offences or offences which disqualify him for the office is ac. 7 Bac Ab. 5.

36. When the words of themselves do not import a reproach to the Plff's official character a colloquium is necessary, in the dec^n the form is this " the words were spoken with reference to the Plff in such an office as an Officer. (Ld Raym 1296. Salk 695. Esp Dig 500) Ld Ray 1369. Stra 618. 1 Selw 280 But if the words themselves import a reproach to the Plff's official character a colloquium is unnecessary 1 Selw 280

37. So when words complained of are not ac. unless as they refer to some collateral fact to which the words then

Slander.

— Plffs do not impose a reference, a Colloquium is necessary to shew the reference 2 Saund 307, 5 Mod 308 2 Strange 1169, Esp Dig 501.

Within the words drawn of themselves shew to whom they were applicable by designating the Person or subject matter an innuendo is necessary.

38. In almost all actions the Slanderous words themselves do not designate the Person or subject matter to which they speak. The office of the innuendo is to explain the application of the words themselves to the Person or subject matter, an innuendo is used in this manner, "He (meaning the Plff) is a thief and I (meaning the Deft) can prove it" 4 Co 17 B.

39. That is a Rule laid down in the Books which Common is incorrect to its full extent. It is true, words which cannot be rendered certain by a Person or subject matter at the time of speaking cannot be rendered certain by innuendo.

The true rule is this, Any thing which taken in connection with all the parts of the conversation, wherein it is uncertain cannot be made certain by an innuendo

40. It can be made certain only with reference to some thing said which is certain for Ex. —

The Deft used these words. John Stiles stole his neighbours horse or ass. The Deft used these words. "A certain person stole his neighbours" John Stiles brot the action alleging the words as said. By way of innuendo stated that the Deft meant Plffs horse, this innuendo was misplaced 4 Co 17 B. Rol 143 Comp. 684. As an innuendo is merely explanatory it is

Innuendo.

obvious it cannot carry the meaning of words beyond their proper import — In Engd the burning of a barn full of corn is felony. A barn not full of corn is not felony. the Defdt says. John Stiles burnt my barn. Now if the Plff alleges that the defdt and John stiles burnt my barn meaning his barn full of corn. it is an innuendo of no avail —

41. Now if the Defdt speaking of his barn being full of corn and had in the same conversation said. "John Stiles burnt my barn" he could have been a sufficient cause of action by way of innuendo that the Defdt meant his barn full of corn.

42. When the words were "he stole an half an acre of my corn." the Plff could not allege by way of innuendo that the Defdt meant half an acre of corn reaped as in the Farmers Statute the case in the language of the Defdt was not felony but by the innuendo the Plff made it felony Cro. 684 Cro Eliz 428.

43. An innuendo which is unnecessary is surplusage, it cannot vitiate. Where the Plff declared that the defdt "said he the Plff had perjured himself meaning the Plff had perjured himself in a Bill preferred in Equity. the Court arrested the judgment — the innuendo here, is surplusage and may be treated as such because the words "he has perjured himself" are actionable in Se, and require no innuendo. Cro 669 1 Rol 83 4 Bac. 510.

44. If it is uncertain as to the person from all the words taken at the time, no innuendo can make it certain But if from the whole words taken together a person is meant. tho the slanderous words do not mention

a person. an innuendo in this instance is good 4 Co. 17. B Esp Dig 511. Cro Eliz 497. Hob 245.

45. Where an action is brot by one for words spoken to injure him in his trade profession or office. It must appear in the dec^n that he was in such a trade office or profession. for this is the gist of the action Hunt 49. Esp Dig 315. Cro Eliz. 749. Cro Car 205.

46. Here the averment was that the Plff was and that the Plff has been for many years in the profession & office. this was held not to be sufficient. It must appear by express words that the Plff has the profession & office at the time the words were spoken and the word "many" is indefinite. Cro C. 273 Hob 159. Cro Jac 220. Cro Car. 282

47. Where the action is brot for words spoken of a trader as such he must allege in his declaration that he "gains his living by buying and selling." for this is the legal definition of a tradesman in Law. It is not enough to say he is a tradesman at the time of speaking the words but must say & allege in his Dec^n "that he" gains his livelihood by buying & selling" Esp Dig 315.

48. It is a Rule given by almost all authors that words spoken of a person heat & anger are not ac. 3 Bulk 183 1 Lev. 49. Esp Dig 520.

49. This Rule does not extend to words spoken in a passion for there all slanderous words are spoken in a passion. The Rule is words that import no Malice or are charged but as words of gen opprobrium in the excess of the passion. But those words if written are actionable. 2 A Ro! 335.

50. In Engl the Ct have held that words however slanderous if capable by any forced construction to be innocent

the innocent meaning should be taken. Again the Cts held & adopted the rule, that all words from whence construction could be made of Slander then amounting to Slander, should be so construed.

51. But the rule now is, That words are to be taken in the sense in which they would naturally be understood by the hearer Cowp. 688. 275. 10 Mod 198. But NP. 4. 5 Esp. 463. Peakes R. 4 N. Cas N.P. 1061—

52. When words in themselves are actionable & admit of an innocent meaning, the onus probandi & rebutting this presumption, lies on the Defts & Cts have enquired of the hearer how he understood them. Typeak, words deadly &c. & admit of an innocent meaning metaphorical & punning words. which when so spoken are not &c Peake Rep. 4. N Rep. 335. 1 Johns 279. Sibia 180.

53. Slanderous words unintelligible to the hearers are not &c. if spoken in a foreign tongue & known to none of the hearers there is no cause of &c. But if understood they are &c. Cro Car. 865. Hob. 126.

54. In construing words claimed to be actionable all the words used by the deft at the time in the immediate connection of the words are to be taken together. Subsequent words may explain the former & so contra. Esp Dig 511. 4 Co 19 a. 2 Mod 154. But ni P. 4 The rule is the same here as in the construction of Contracts

55. But Courts cannot do violence to Language for the purpose of finding a harmless & innocent meaning

56. When they carry to the common sense of the hearer not as from the reporter must be &c. such are &c.
If one shall say to another "you swear falsely in a

Slander.

wound you gave him" the words would be a.c. Esp Dig 2 Evb. 512
Bul 6 5. 4.

57. But in the other hand inferred constructions cannot be had for the purpose of making words a.c. when they could convey an innocent meaning - 4 Bol 117 Esp Dig 502

58. It is also a general rule that words to be a.c. must import a direct charge of a slanderous nature and the slanderous meaning is not to be left to inference than for when the words were," John Stiles got his money by swearing & forswearing" they were held not a.c. because the expression is too general, for perjury is imputed to no one individual & certainly not to P. L for his oath could not be allowed in his own cause 4 Co 15 st.
Case 481 Note 7.

59. But when the intent is to charge a crime or any thing else slanderous, the charge is actionable, the rule of construction does not require the same absolute positive construction as is required in Pleading, when the Deft" said of the Plff" I will prove you a Perjured knave" this was held a.c. because the words convey to every mind a criminal charge of perjury - Bul 4 Esp Dig 172. 1 Rolle 49 - Yelv. 166.

60. When in an action case the words were, "I will prove he has poisoned John Stiles" they were held a.c. yet this would not answer in Pleading it would be an indirect averment of the fact 4 Co 16 2 Saund 276. 1 Rolle 56

61. Words in form of Interrogatories, may be a.c. if they convey to the mind of the hearer a charge or imputation of a crime not. are a.c. when the Plff. said "when will you

return the sheep you stole from me," it was held a act. 1 Rolle 48. 12 Co 134.

62 As a general rule words actionable in se are prima facie evidence of Malice. This malice may be rebutted by circumstances as Confidential communications excluding all presumption or probability of Malice. Where upon a reasonable enquiry concerning the character of a Servant & when honest & reasonable information is given the the words be Slanderous. — here is no malice. & Did the Servant recover it must be on proof of malice in his master in person giving the information. Bac. 2422. 1 Y & C 110. Bul N P 8 4 Co 91. Esp Dig 502. 3-5 Esp. 110 Dunp Ca. 3 Bos & Pul. 587.

The ground of this rule is for assisting me to information in such necessary points. the facts generally communicated are of a private nature and the Serv might be compelled to prove them, no one having knowledge thereof except himself. When one said to a Confidential friend in a spirit of concern & by way of warning "such a Trader will be a bankrupt soon" the words were held spoken honestly Confidentially and by way of warning Bul N P. 8. Esp Dig 503.

63. The repetition of a Slander fabricated by another is in general with this qualification if he who relates actionable words of another and at the same time names the true author they are not ac. 1 Bul N P 10. Esp Dig 571. 4 Y Rep. 17. 12 Co. 133-4- 2 Carr 426. But here the intentions of the speaker must be regarded for if yielding to artifice the words as a man may intend a beggar to perish after the words in order that they may justify his repeating them

Slander

64. When one said "I have heard John Stiles was hung" & spoken with actual concern & fear, this was held privileged, but if spoken maliciously it would be otherwise Lev 182, 4 Co 14, Bul N P 9, 10.

65. The Defts suspicion or entire belief in the truth of the words is no justification, but this may tend, in the case of the Jury to mitigate damages — Cro Eliz 38, Esp. Dig 5 18.

66. Slanderous words extorted by provoking words are not actionable. Thus when in a very animated controversy between A & B. A said "damn you say I am perjured" B answered yes, this was held not to be act. Cro Car. 297, 413 & 498.

67. There is an analogy to this rule in cases of injuries to persons, when violence are justly broken, violent language & extortion provoked the answer, words cannot justify violence but words may justify words —

68. The truth of the words spoken is always a good defence, the slanderous words must be false. 1 Rolle 87, 4 Bac. 516, Bul N P 8, 9 —

69. There are circumstances in which the Deft may justify the act but for slanderous words the truth of it is no justification, the false words are published yet if in the course of Judicial Proceedings they are not act. of it. Exhibits articles of peace as B, it is not act. when Ps. & Justices are the means of malice and persecution. the purpose is not slanderous but mal. pros. 4 Co 14, Cro Eliz 230, 248, Hob

82. Hut 113. Esp Dig 105. and upon a similar principle if an Officer of the Law, had arrested a man upon a crim Charge, committed him to another person, as a Sheriff commits his prisoner to the goaler, and said, "this Person has stole" this was held not ac. because his words were equivalent to saying he is complained of being Guilty of an act a crim 3 Esp. 32.

70 It has been held that if the Pff is charged by another of a crime not cognizable by the Courts, the Party is liable. This I take not to be Law - the Respective ac is Mal. pros 1 Co 14 " Cro Eliz 230 " 248 " 1 Rol. 206. 267 " 1 Rol 34 " in these Cases the ac will lie " but in the following late cases the ac will not lie 1 Saund 132 " N 1 " Cro Jac 432 " 1 Hawk 131 Chap. 73. Sec. 8. " 5 Esp Rep " 109 " to 110. A. these latter decisions is I conceive right) and according with the principles of Law

71 On the same principles. The Person charged in a crim complaint may say "the complainant has sworn falsely and committed perjury, for this is matter of defence and in a Court of Justice this is said by way of argument: 1 Rol 87 " 2 Bur 807. 4 Bac. 449 " 518.

72. A Party in a suit may lawfully say & justify of his saying of a Person he has perjured himself, by way of objection to his admissibility as a witness, he may say this and the words are not ac. even this he does not support the question " 1 Saund 132 n. 1. 1 Rol 33 " 87. 3 Lev. 138 " 163.

73. On the same principle words used in a complaint to a Jury. to a proper Magistrate or in an indictment are not ac. If they were ac we could with safety take no person on Suspicion Cro Eliz 147 " 3 Lev 138. 4 Co 14 Hob 82 3 & 5 Eliz 32.

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74. Upon an alagous principle actionable words for the redress of grievances in a petition to the members of the Legislature are not actionable. If such Petition should be published & delivered to any other person it would be ac. 1 Saund 2 Bing 810–811– 5 Esp 1111 n.

75. It has been determined in Penn. that to slanderous words by way of defence being arraigned before a Church Presbytery are not ac. for he is then before a Spiritual Court of Justice. 1 Bing 178. 5 Esp. 110 n.

76. Slanderous words used in pursuance of a sentence of Court Martial. 2 New R. 341– are not ac.

77. Under the Gen Principle, it is a Rule that slanderous words spoken by a witness in gen. are not ac. If on an indictment a Witness should falsely swear, he is liable in this ac. but not a pros[ecution] for Perjury Cro Eliz 230 Kirk 11– 2 Bulstr 269 – Yet if the witness goes beyond the fact & slanders a third Person he is liable. I can see no reason why he is not ac if he goes beyond the fact and slanders the Party accused 4 Co 14 a. Esp Dig 504

78. If any witness charges another of having testified falsely the charge is not ac. even if he says he has perjured himself it is not ac because it is a mode of supporting his own testimony 1 Saund 131– Esp Dig 505. 518 a. 2 Bing 807 a. 5 Esp 110 n. Cro Eliz 230–

79. Slanderous words are not ac. if spoken as counsel in a Ct of Justice in a cause. This rule is not universal. But in some cases if spoken under these circumstances is a good defence 5 Esp 110 N. But N P. 18

Pleadings

80. It is a rule where words the false and scandalous are pertinent in a cause he is not liable if they were suggested by his client. What difference the clients advice can make I cannot tell Esp Dig 517. 3 Bl Rep 29. Cr Jac 90. This rule supposes words to be pertinent in the cause.

81. If words are spoken that are impertinent. they are AC. tho they were suggested by the Clients Cr Ja. 90. 91—3 Bl Rep. 29. Many Books make a distinction as regards the suggesting of the words by the client. tho I deem it unnecessary — A Servant a Agt. can be obliged to do that by the command of his Master a Principal. which the law prohibits. 1 Roll 33. 87. Bal A P 10 Esp Dig 517.

82. It has been determined for the purpose of mitigating damages in the favour of the Pl. Deft. the Counsel may use impertinent Slanderous words Hob 328. 1 Roll 87.

83. In a late Case the Rule has been carried further. It was held that an Advocate is never liable for words, slanderous in the deft Case, as a Client's cause, for it is said he is influenced by the Client. Stile 462, 4 Bac 498. Mod Writers have gen taken no notice of these decisions & I conceive it not to be law. for it would be a disgrace to the Law, and the case of Hob. 328. is inconsistent with sound principle

Pleadings of Defts. to Pls. Declaration.

1. With regard to the Pleading it is usually to declare that the Defts. utter "falsely & maliciously." What can be the word Malicious is not necessary, especially after verdict 1 Saund 242 a 1 Keb 273. Foy 35. 4 Bac. 512. Esp Dig 516. n. 125.

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The doctrine here advanced is that a direct averment that the words are false thus being of an ill nature renders it unnecessary to allege malice for it is implied

I conceive that malice ought to be expressed in the dec. because malice enters into the definition of actionable words. & I wonder not run the risk of demurrer a dec. without alleging malice The reason given does not satisfy the form of Law. for it seems that when malice is part of the ac. it should be expressed by being stated in the declaration The case of Murder became an allegy in point of allegy. Malice for in Murder malice must be alleged & if in murder why not in Slander.

2. The Declaration usualy contains an allegation of the Plffs good fame. but this is wholly unnecessary & it is always to be supposed that the Plff is of good fame until the contrary is proved 1 Com. Dig. Ac for Words, 195. — As to the allegation of a Publication it is sufficient to state that the words were spoken "openly and publickly" without saying as is usualy practised "in the presence & hearing of divers good citizens &c"

4. It is sufficient to allege the words as spoken in the presence of divers persons, without alleging "openly & publickly" Cro Eliz 861, 486. Noy. 51. 4 Bac. 512.

5. When there are two Counts in the declaration on charging words &c. and the other charging words not ac. If it is a Plea to the whole declar. the Jury find for the Plff entire damages. Judgt will be arrested,

6. But when there are words ac. & not ac. in the same count this rule does not hold 8 J Rep 564. 1 Con. 508., 532. Stra 1094. 3 Mich 177 - 10 Co 130.
This rule is founded upon a very obvious principle. If the Jury assess damages on both Counts. I mean upon the whole Dec. it is to be presumed that they assess damages on the bad Count for which there is no cause of ac. This rule has been rejected by the Sup Ct of Errors in this State. as being an inexpedient rule.

7. In actions for words not actionable the Plff must allege Spec. damage as the Gist of the ac. and if he does not it is ill. but in Actions for ac. words there is no need of alleging Special damages. for in the latter damages are presumed while in the former they are not and must be spec. proved 8 J Rep 130. Bac A.P. 6. 7. Esp Dig 520.
By Spec. damage is meant actual damage sustained —

8. When the words complained of are in se ac. the Plff may allege spec damage. and prove it in addition to what the jury would have given him if there had been no Special damage. He can prove no other actual damage than such as is alleged in the dec. as spec. damage. For the defd has no notice of any other. & the Defd cannot be prepared to answer any spec damage unless apprised of it. Ins Ass. 1 Roll 38 n 58

9. But it has been held and decided that where words are not ac in se the Plff may recover spec. damage without

alleging it in his dec. under the gen. allegation to his damage sounds in. This is clearly agreeable to the principle of Law & now is not Law Hen 666- Bac Ab 7, 5 Esp 520. & 7 Rep. 130. 1 Saunders 4-

10. As to what amounts to an allegation has been a questio vexata in Act for Cro Ja. 499. 1 Roll 58.

11. With respect to words not actionable there is no such thing as a Classification of them. It is immaterial what the false words spoken were. If they were spoken with an intent to injure & have occasioned actual damage 4 Co 17.

12. Slander is a species of Slander called Slander of title which is ac. This consists in calling an Act presumptive illegitimate. It seems to me to be a mere saying not ac nisi. According to all opinions it appears that the Plff must prove something more than a mere allegation of words 4 Co 17, Cro Ja. 213. Esp. Dig 501. 1 Roll 38. But this charge is not ac if uttered by the next presumptive heir of the crown. for it is a mode of claiming title in himself 4 Co 17. A & B. Esp Dig 501-

13. General Issue

denies that the def spoke the words as they were not malicious - as in the case of the Claimants of a Servant given by his former Master 1 Rep 110 B. N. P. 8. Esp Dig. 503. 517. 1 Lev. 82

14. Under the Stat of Pleading in this State & by the Ct of N York the Gen Issue includes all kinds of defence

except some act of the Plff amounting to a discharge
Now I would have it remembered that in all Spe-
cial defences there must be notice given to the Plffs
Council.

15. It has been an immemorial rule that the Cha-
racter of the Plff is put in issue as to the Speech
Crimin Charges against him. therefore the Deft is
allowed to prove the gen. character of the Plff 1 Roll
354. 450. But it is only his gen character he can ten-
d. for the Deft cannot prove other specific facts or acts
than those which the words charges upon him. If the words
were "the Plff stole a yoke of oxen." The Deft may prove that the cha-
racter of Plff is that of a thief. but he is not allowed to prove
that the Plff has stole a horse. this rule arises from
a recent decision in 1 Mann & Selwyn. 284. 2 Camel 251
Peake. Cas. 92. In 1820. The same rule was adopted in the
State of N. York in the Circuit Court, 1 Johns 46 Callas Rep
518. where the rule is contra. "In the case of the Cir-
cuit Court decision. the Plff was charged of perjury. the Ct
allowed the Deft to prove a want of veracity."

16. The Defendants bad character generally, can not be
given in evidence to bar the action but only in mit-
igation of damages. as if the Plff is called a thief
Proving the Plffs gen character as a thief comman-
ds in Bar of the action but in Mitig Dams

17. The truth of the words spoken is a full Justification
but when such is the defence it must at Com. Law be
pleaded 1 Roll 87. Bull N. P. 9 4 Bac 516. Stran 1200 Cro
Dig. 518. But the rule in Eq. is. that the truth of the

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words cannot be given in evidence upon the Issue or in mitigation of damages. Ante 1200. Bac Ab 518. But 1 B 8. contra.
I imagine this is proper evidence to be given in evidence -

15. In some Cases the Deft may justify if the words are ac. & false. but here he has not pleaded spec. as in the Case of words spoken are publication of (an accusation) of judicial Proceedings 4 Co 14 Cro Eliz 230. Hob. 82

19. Any Recovery in this action is a bar to a recovery for the same words spoken, whether the words are ac nat ac. An Action will not lie even for subsequent damages since the recovery, there can be but one recovery for the same thing, Bac Ab 7. Bac Dig 519. This rule is applicable to all kinds of torts except that of nuisance. A. struck B in the eye and at first occasioned a slight injury, was submitted to attention thereupon awarded a half to be paid ie. B. but afterwards the sight of the eye was totally lost thought the first injury an action was brot for subsequent damages but it was decided in this State that no action would lie,

20. It was formerly necessary for the Pltf, to prove the words precisely as laid, any little variance was fatal but this rule is exploded. It is sufficient now for the Pltf to prove the substance of the words Bac Ab 5. 2 Roll 7. 18. a 718. Bac Dig 521 - 8 Rep 150.
still the sense must be the same and the manner

must be in some respects the same. Confounding the personal pronouns which will prove fatal as if the words were "You have committed felony as addressed to the first person & Proof "he has committed felony as addressed to a third person is fatal. 8 J Rep 150 4 ibid 217. Bul N P 5. Esp Dig 521.

11. The Plff after proving the words stated in the declaration may give in evidence other words of a similar kind spoken of him by the defd at a different time & even words spoken after action brot. these must be words of a similar kind Esp Dig 518. Bul N.P. 10 P. Rep 22. 74. 1 Camel 49. 2 ibid 73.

The principle of admitting such evidence is not to aggravate damages, the true office of the rule is to prove express malice. the party always makes out his case by proving actual express malice Bul N P 7. Esp Dig 520. Stra 691

22. It has been held that words ac. in se may not be given in evidence but are the foundation of a defts recovery, but that words not ac in se ac a may be given in evidence these rules are exploded 1 Phil. Ev. 134. 5. 1 Camp. 49.

23. But on the other hand as the Plff is allowed to prove similar words spoken by defd &c defd may prove the truth of those spoken at a different time Bul N P 10. Esp Dig 518. The

24. English Statute of Limit. limits this ac to 2 years from the time of speaking the words. but the Engl Cts as well as ours in this State have decided that this Statute does not extend to words spoken not ac in se. and

Mod. Reg

Slander.

are not within the Statute, and that there is no term in such a case limited 1 Stew 95. Esp Dig 519. Our Law limits the ac of Slander to 3 years

25. If a Joint action of Slander by two Plffs. cannot be kept and the rule is the same as against two Defts 2 Bur. 984. Esp Dig 504, Bal N.P. 5th Vols. 120 121.

26 The wrong in Slander is a species of tort when no act is performed. The Law does not regard the speaking of words as an act. two persons cannot join in the act of speaking words. and those whose their right violated cannot join for the injury of A's Reputation cannot be hurt by B's

27. Respecting Libels tho' more depts may be join But to this gen rule there is an exception in the instances of the slander of two Partners in their joint capacity as Traders. the point decided as to this point, that if spec. damage is sustained they as two Joint Plffs can recover 2 Stew 1162 3 Bos & Pul 150 2 Saund 117. A. n.

28. But suppose the words are ac in se. in the case of Joint Plffs or partners? I cannot see why Joint Merchants cannot maintain an ac for words ac in se. with respect to the action in case of Joint Partners for words ac in se. no rule can be found 2 Saunders 117. A. n. his opinion ——

29. Slander may be in writing which is called a Libel Whatever words that are &c. when spoken are Slander so when written 3 Wils 126 Esp Dig 504.

Libels

30. This does not hold in common. It is not true that all words that are &c. in writing are as if so spoken 3 B & P 126. 3 Bac 490. Mr Espinasse lays down an incorrect rule. He says Slander (spk) & libel differs only in this respect. the one is slander by words, the one is a charge & injury to another by words. the second is the injury by Libel writing - Esp Dig 504

31. Written Slander is regarded as a more aggravated injury than the other because it has more extensive circulation, as being permanent & more highly malicious as being delivered with greater deliberation.

32. The definition of a Libel is very different from that of Slander by words.

A Libel is defined to be a malicious defaming of one being a dead, published by writing & printing tending either to excite resentment & to expose him to punishment odium contempt &c.

33 This definition is founded in part with reference to the law regulating publick offences

The slandering of a deceased person cannot be a subject of an action except only in detail. so far as writing, tends to excite resentment. this part of the definition is adopted, in reference to a public prosecution 4 J Rep. 128. 1 Hawk 352. 4 T R 150. 3 do 490. In Slander by words, spoken there is but one remedy that is a civil action, But in Libels there the person is subjected to a liable to be subjected to two actions one civil & the other criminal. The publisher of a libel is not only liable in a civil action at the suit of the party aggrieved but also in a criminal prosecution. But in cases of a libel

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a deceased person then can be but one action which is an Indict.t 3 Wils 125

34. The general rule relating to words spoken as not to apply to Libels when considered as civil injuries. This is a Rule true so far as the affirmative rules describes the words the rule is to this extent any writing falling within the class of the 4 ac. words are libellous. the Negative rules which are laid down as to the ac quality of words spoke do not apply to the same written 3 Wils 403. Stra 4 848. 3 Bl Rep 126. Esp Dig 504—

35. The same circumstances which justify words spoken justify Slanderous words written so far as regards the civil remedy as Slanderous words written of Judicial proceedings — In Gen whatever will rebut the presumption of malice in the case of Slanderous words spoken will rebut the same presumption in Sland words written 2 Burr 807. Esp Dig 505 An ac will not lie for publishing a true account of a trial in a court of Justice tho the consequence should be a serious injury to the party a parties. for such publication is a mere narration of facts 1 Bos & Pul 525. Esp Rep 110 n. 1 Ibid 450. 8 T Rep 293.

36 In a Civil action ⁄ for a libel the truth of the words is always a good defence this is a settled point tho one or two dicta are to the Contrary Hob. 253. 17 Rep 748. 2 Mod 166. 11 Ibid 99. 3 Wils 150

37. But on a Criminal prosecution for libel the truth of the words cannot be given in evidence according to the Com. Law. it is immaterial whether the words are false or true. the prosecution is not for reprimand

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dict a person for publishing a libel but for disturbing the peace.

38. The Truth of the Libel is always considered of weight & ought to mitigate (damages) the offence, & its falsity always aggravates the offence 3 Blk. 125. 6. ind 150 5 Co. 125 Rom 498. 2 McNally 640. Much less is the bad reputation of the person slandered. 2 McN. 649 - 7 J Rep. 4.

39. There is a Stat Law in most of our States which permits the truth to be given in evidence in case of Libels - as well as words spoken,
I approve of the Com. Law rule and consider it as not inconsistent with the good of community

40. It is essential to the constitution of a libel that it be published. and the modes of publication are various, thus, originally writing the libel although dictated by a third person, is a support in publication. Curth 405 5 Mod 163. 2 McN 642 Esp Dig 510

41. The publication may consist in the composing of it. he who procures it to be composed, reads it aloud after it is published knowing its content. showing it to others, affixing it upon a public place so as to be exposed to view, forwarding it in a letter to a third person

42 It is a Gen rule that to be wilfully & wrongfully instrumental in publishing a libel is ac. 9 Co 59. 73. 2 McN. 643. Ld Raym 341 Salk 418. 2 Wils Rep. 1038. Esp Dig 510 1 Hawk 195 -

43. The sale of a libel by a Book seller is ac. provided he knows the contents and sale of a libel in his shop. renders him liable. proof of this is prima facie evidence. yet proof of the Book-seller not knowing the contents & not knowing of its being sold would alter the case.

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this is founded on the gen. maxim. qui facit per alium facit per se. 2 McN 644. Esp 510. 5 Bur. 627. 2687.

44. And this is the case, if a printer of the journeyman or apprentice publishes a libel, this is prima facie of its being published by the printer and the onus probandi lies upon him to shew his dissent thereto, as that he was absent from home, and could not now be present to accuse, & this being imprisoned at the time the libel was published all this is prima facie evidence of his dissent 2 McNal 648. 2 Hawk 131.

45. In the latter case the imputation against the Printer a Bookseller does not excuse the agt. a Servant 2 McN 648. 647

46. Ignorance of the contents is a sufficient excuse in case of a Libel sold which excuses agt. Principle. but the onus probandi lies upon the Deft. to prove this 2 McN. 649.

47. Sending a libellous manuscript to the press for publication is in law a publication and the person who sends it is liable as being guilty of the publication Esp Dig 510.

48. There are many other modes of publishing libels not mentioned as singing a libellous song or ballad &c. is ac. 2 Bur 807. 5 Bur 2686. Esp Dig 510. 5 Co 125

49 But reciting the purport & sub of a libell in unconnected without malice is no publication, the bet. friendly in support repeats a libell, but there must be no malice or evil design 2 McN 643. 1 Hawk 196. Esp 510

50. If there been a point of very considerable dispute how

By Libel.

for sending libellous matter in letters to the Injur of it
It is now settled that in such case the author of the
libel is liable in a public prosecution the suit in civil
action 4 Blk 150. 1 Hawk 195. Pop. 134 & 139. 12 Co 35 Hob 62. 215
1 Mod 58.

51. When matter strictly libellous written to another is sent by
way of warning it subjects the author to a pub. pros. - This
seems to me to be true when the party communicates a
confidential friendly letter by way of warning
It seems to me that being liable to public prosecution
does not necessarily subject him to a civil ac - Tho
it has been expressly decided in books that all libellous
matter which supports a public prosecution will
expose the party to a civil ac.

52. In many cases words written are ac. yet if spoken are
not ac. not only the four classes of words ac but also
any thing in writing published which is false and scand.
alous the Injur of it being odious & ridiculous is ac. 2 Wils
403. when if those words were spoken would have been not ac
1 Bos & Pul 331

53. It seems agreed that words of heat and passion when
published are ac. as to say you are a rogue villain
Rascal It has been decided that writing & printing
of any one as a swindler is ac. whereas if spoken would
be ac only in case of a trade. 2 Wils 404. 1 Bl Rep. 788.
2 Ken 1 Blk. 531 -

54. The Offence and civil Injury of a Libel are considered as con-
tinued in every stage of its existence. If a libel is pub-
lished in the St of Maine and is circulated thro' the U.S.

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the publisher is guilty of a publication in every place where the paper goes. so that an ac can be maintained in any State a County where the Paper circulates 1 T Rep 571 - 647. 1 Wils 178.

55. It is not indispensible to the constitution of a libel that it is direct and explicit so that every reader should understand it fully
It is sufficient if it so pointed that any person can understand it

56. No man can elude his liability by introducing a feigned name or by inserting the initials of his name. for if the object of the libel can be ascertained by the reader 1 Hawk 144. Esp Dig 506. 2 Atk 470.

57. A Libel may be brought against several defendts either by civil ac or Indictment, for writing and publishing is but one act in which many may be concerned one may write, another print & third publish &c. 2 Bur 984 But N.P. 5

58. With regard to libels there is a peculiar rule in the Com Law for on an Indictment for a libel if the jury find the fact of the publication & if they believe the innuendo they are bound to find the Deft guilty - they have nothing to do with malice. for malice the point arises upon the face of the record the proof in this respect is "pri generis" this rule at first seems strange. But after the verdict of the Jury the question of Law remains open to the Ct upon the record, so that a gen verdict in this case speaks as a special verdict in other cases 5 Bur 2668. 2 Str. 561 - 3 T Rep 428. Salk 417, in Support we would say that a pers

By Representations.

should publish a libel and was insane, must the jury find a publication and know nothing of the insanity. The Jury must find no Publication. In this Country and I believe thro the States it is established by Stat. that the jury shall have a right to judge of the Law and necessarily the fact subject to the Charge of the Judge as in all other cases In my opinion this Stat. provides Amounts to no more than the Com. Law rules in its full extent

Slander of the third kind is called Slander without words ——— Slander without words spoken or written.

1. This species consists of wil representations as pictures signs, emblems effigies &c. Thus hanging a gallows before another mans door. hanging in effigy it is equivalent to saying he deserves to be hung. What may be considered as defaming in one country may not be so considered in another. in London lighting a lamp in the day time before one door, is ac. for this And to say "you help a bad house" So painting a Duck on a physicians door is ac. 11 East 226.

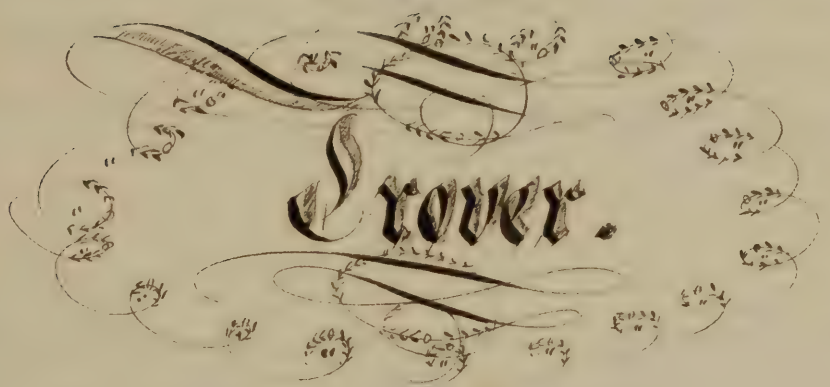
2. Indeed to represent any one equivocally by painting signs or symbols of any kind is libellous. So Painting the likeness of one with an Ass ear a ears. to paint one in any ridiculous situation is libellous.

In all these cases the application & signification must be supplied with innuendos. for if not the doc is ill for the Ct can take no cognizance of the intention of the representation unless stated expressly by innuendo 4 Bur a Bac 441 — 3 Wils 125 — 6 Esp 571 —

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3 It is laid down (as a) that in actions for this species (species) of title there must be alledged Spec. damages & prove them. the reason assigned is that the import and application of the representation cannot be made certain unless there be some specie Damage. this seems to me to be a strange doctrine. there are but few rules relating to this kind of Slander. Esp Dig 511 - B.N.P. Com. 1256 A rule has lately been put in practice. that when the identity of the person is libeled is disputed the declarations of Spectators at the time were admitted as evidence. If this rule is good the former rule requiring the allegation of Spec damage is useless. 2 Comyns 514.

End of this Title.


Prayer.

Trover

1. The more formal appellation is "Trover and Conversion" derived from Stat. Westm. 2 13. Edw. which is the origin of all actions on the case 3 Reeves Hist 58. 2 Hist 89. 202-3 243. 341

2. This action lay originally in case where one actually found the goods of another & refused to deliver them to the owner on demand and converted them to his own use. 3 Bulst 152, 5 Bac. Abr. 256.

3. This action lies against any one who takes the goods of another wrongfully in which this action is concurrent with Replevin formerly Detinue was the only remedy

4. To there be an unlawful taking it must not appear upon the face of the declar. in Trover. the Plff must waive the tortious act in arms and declare as if the goods had been lawfully taken. Cro. Eliz 894. Cro Jac. 50 1 Mod. 31. Stra 128. Esp. 589.

5. And now this action lies in general in all cases in which one person is by any means possessed of another persons goods and converts them to his own use as. if he sells them. destroys them. wrongfully uses them. a wrongful refusal to deliver them on demand and refusal of them

3. Wils. 133. But N.P. 33. Bro Elis. 781.

6. The first action of the kind is Trover and Conversion, was introduced in the reign of Edward VI. 4 Leon. 44 Hei. 385. 6. 526

7. The fact of finding the original indictable is now fully immaterial.

8. The mode in which the Def[t] came possessed of the goods of the Pl[ff] is not a part of the gist of the action but only the inducement. The Dist and only cause of action is the conversion Still the dec. alleges that the P[ltf] goods came into the possession of the Def[t] by finding According to modern decisions the act of finding is indispensible. Some authors suppose and Salkeld says that the allegation of the finding is immaterial in the dec. But N.P. 33. 3 Buls. 313. Esp Dig 587. 5 Bac. 275.

9. The allegation of finding when made in the dec[n] is not traversable, for if it was the action would be reduced to its original limits, by it being not traversable is meant that it cannot be specially denied. The Def[t] may on the Issue give in evidence that the goods he never took at that they were never in his possession

10. This Action in Mod: times has superseded the action of Detinue as the dec. of Op[t] has that of Delt. because it detinue. The property detained must be specifically described which often times cannot be in conveyance - & also that the Def[t] was allowed wager by Law. 3 Wils. 133. a 223

11. Conversion is the gist of the Action, by conversion I mean

-cant one assuming to dispose of the goods of one as if they were his own. 6 Mod 212. 1 Sid 261. 2 Keb 280

according to this the Conversion of goods is ex vi termini a tortious act. The consequence of the term conversion is that the conversion of another's goods can in no way be justified. for to justify such act is to deny & this tends to the peculiarity of pleading in Trover

12. By the face of the declaration the act is supposed to have come lawfully to the goods, tho the Action will lie as well when the original taking was unlawful, as well as if lawful. for the Plaintiff waives the tort.

13. In trover there are three things which constitute a conversion. 1st The unlawful taking of another's goods 2d The unlawful using of them 3 The unlimited detaining of them.

There are the only 3 methods in which a conversion can take place. these all severally constitute a Conversion. but the evidence in the three cases is different it varys according to the nature of the act of Conversion. Salk. 655. 5 Bac. 268. 4. 1 Roll 6. Esp Dig 590.

14. A Conversion always supposes a misfeasance and not a nonfeasance.

15. 1st Hence the Conversion of another's goods may be committed by taking unlawfully. Taking per se is a tort. Conversion. When the taking is tortious there is ground of Action demanding the restitution of the article for the wrong is complete and the conversion consummated

1 Sid 264. 2 T Rep. 165. Esp. Dig 580: 589. 3 Mis 146.

16. In this class of cases the act of Trespass is a concurrent remedy with Trover 5 Bac 265, 2 Stra 943.
In an action for goods wrongfully taken the owner may bring Trespass and declare upon the force or he may bring Trover and waive the tort.

17. Tho the tortious act is waived in the dec: yet the Pff does and must depend upon the proof of the tortious taking to entitle him to recover. Trover waives the tort as such but not the Conversion. Trover waives the tortious taking quoad the form of the dec. but it is founded on the tortious taking in evidence

18. The Conversion of the goods, is the unlawful using of them, when this is claimed the Deft: possession of them is lawful. thus if the finder of goods uses them, the using him is the Conversion. If clothes are found and worn, if goods are bailed & the bailee uses them, in the using is the conversion. pin is in need of demanding the restitution of them Cro Eliz 219. 5 Bac 257.

19. When the original taking is not tortious there must be some evidence of a conversion, as of the bailee using instruments entrusted to him: using and abusing a thing is a conversion, as when a person found a quantity of paper & put it into water when it was injured. When a carrier of a box of goods spread them and took out a part of it & he sells them, & if he beats the animal of another so as to injure it, it would support the action of Trover 1 Salk 655. Bull 32, 3 Blk 153. Cro E 219. Bul NP 31. Comyn. 419. 2 T Rep 144. 1 Wils 337

6 Ibid 697. If the bailee a finder of the goods destroys
20. them he is liable in an act of Trespass or Trover. he
may (at) maintain Trespass tho the original taking
was tort Bolton v Co Lit 57. 1. 5 Co 13. B. 2 Roll 555. if
the goods are bailed the contract is extinguished by such
a wanton act - a destroying them. an act of wanton destruc-
tion shews the original intention of the bailee to destroy
the goods. This principle speaks only in case of excess-
ive (cruelty) wanton destruction. if the bailee of a Pipe of
wine draws out the wine and intermixes any other thing
he is liable in Trover for the conversion of the whole Hern 5 Co
Esp Dig 581 all these examples are misfeasances not non-
feasances if one suffers goods to be injured by his negligence
or thro his cause he is not liable in Trover for it is not a
positive act but the action must be Trespass on the case
as if one finds cloths and suffers them to be moth eaten
8 Co 146. Hob 281 Esp Dig. 580. 581 - 590. 2 Roy. 909. Co Lit 219. Salk 655.
2 L R 917. Jones on Bailmt 48. Esp Dig 580. 581. Bac on Com. 252
21. If a common carrier loses the goods entrusted
to his care he is not liable in Trover. Salk 143. 655.
Then is one case decided in Co Lit 219. that when a
bailee of goods suffers them to be destroyed he cannot
be made liable in any way for long tho C. he is not
bound to take care of them. This is not Law - it is pro-
bably a mistake in the reporter.
22. If the bailee of goods or the finder sells them he is
liable in Trover Cro 419. Bac Ab P 131 - 1 Salk 387. 2 Ibid 444
2 Ibid 444. 6 Ibid 697. But in this case the act of Bail-
ee is a concurrent remedy with Trover for the principal goods &c.

Trover.

and if the goods were sold for a low price it would be wise in the owner to bring Trover and thereby recover their full value.

23. When is the case when Trover. lies? Proofs on the case and Ind Assumpsit are concurrent remedies, when the Defendt gains possession of goods unlawfully and then sells them, bring Ind Assumpsit & declare on the Defendt taking, he may waive the tort & bring Assumpsit, waive both and bring Ind Assumpsit for money received, is best,

24. Evidence of detainer Conversion is an unlawful detainer of them by the bailee or other & wrongfully refuses to deliver them on demand, his refusal of the goods on the demand of the owner, is a Conversion — Where there has been an actual Conversion and the unlawful taking it is a conversion in the beginning 1 Vid 264. Esp Dig 589, 590.

25. But a refusal to deliver to the owner on demand is not strictly and of course a conversion, it is not in itself an unlawful detainer. an unlawful detainer cannot be justified. Every detainer is not a conversion — There are many cases in which the law does not make it the duty of every one to give up the goods on demand

26. If the real owner of goods demands them and makes no proof of them the finder is not obliged to deliver them up. Esp Dig 590. Comp. 529. 2 Bulst 312.

Under the application of this rule, wilde asked who can judge of the sufficiency, of the sufficiency of the proof

I answer he is to judge from a rational mind and in such a case it is left to the Jury to find whether the owner made sufficient proof or not

27. There are other cases where the finder of goods may retain the good on demand made. for instance where he has a lien on the goods such as in the case of a factor, a atty. Ld Ray 752, 2 Bur 436, 4 Ard 2221.2222. Esp Dig 582.

28. There are other circumstances which will rather justify than excuse as for example. if the goods in the case of a finder have been destroyed without his fault, this is not in the case of a detainer, but in refusal to deliver. this last case supposes the loss to have happened without his fault. if he in this last case had been guilty of neglect he would be liable. Esp Dig 590 6 Bur 2827. Ld Ray 752.

29. A demand and refusal are evidences of conversion and evidence of an unlawful detainer. a demand and refusal is prima evidence, prima facie of a Conversion, but the onus probandi that the detainer was lawful lies upon the Deft. Esp Dig 590, 2 Vol 187, 3 Bl Rep 183, 153, 10 Co 56, B. 57. A. 3 Bur 1245—3— 2 Hen Bl Rep 135. 6—

30. If the Jury in an action of Trover find a specie viendit stating, the ownership of the Plff possession of the Deft a demand by Plff and refusal by deft to deliver, then could be no Judgement. there must be a new Jury called. for finding a demand is evidence only of a conversion. If there be prima facie evidence and nothing to rebut it the jury must find the fact

Trover.

But the Court cannot find the fact upon the face of the record. It is the office of the Jury. 10 Co 56. 3 Bur 1243. Saund 48. Esp Dig 92. Co. Litt. 97 & 495.

31. When the party has a right to detain the goods will be explained, under the title of Master & Servant Mun. Dig.

32. A finder of goods is entitled at Common Law, to no compensation for taking care of the goods after he has found them he may either let them remain as he found them or take care of them gratuitously. If sufficient evidence of ownership is exhibited and demand made, the finder must deliver them or become liable in this action to the owner. 2 Blk R. 1117. 2 Hen Blk 54.

33. There is a Statute Law in this State on this subject when the finder of goods must give notice & is entitled to a reasonable compensation.

34. If one person having possession of another goods does an act to the goods contrary to the command of the owner he is liable 4 J Rep. 260. Esp Dig 581.

35. If a Servants converts the goods of another to the use of his master and not to his own use he is still liable Lindsey 1 Mills 328. Stra 813. Bul N P 47. Esp Dig 580. 586.
Most of the rules laid down and given out on this subject relate to the general rule.

36. Any one who has an interest in the goods converted may maintain this action. It is not essential that the proof is that he has an entire possession, a constructive possession is sufficient. 2 Roll 569. 214. 1 Sid 438.

37. But a bailee can never maintain this action unless he had the right of possession at the time the goods were

Conversion.

converted. If A. should hire a yoke of oxen for 6 months and within 6 months the oxen were converted. B (owner) cannot maintain the action. but if the bailee might for B had neither possession property a right of possession within the 6 months 7 Rep 9 4 ib 489. 1 ib 480. 8 Johns 432. But what is B's remedy in such a case. he cannot maintain this action because he has no possession right of possession. But it is laid down in the Books and seems to be settled that B may maintain an action on the case for his reversionary interest. this special action on the case B may may maintain before the 6 Mo. expire 1 Chit. P. 167. 2 ibid 229. n. 2 Phil Ev. 133. 4 Johns 43. 11 ib 385, 3 Leo 209. 359 — "

38. The bailee may maintain this action against any one who converts the goods 1 Bos & Pul 44 Peake Rep 40 3 Esp 140 Salk 143, Esp Dig 577, 1 Mod 31.

39. Books agree that this action may be maintained by any bailee but according to some opinions a mere depositary cannot maintain this action but this decision is not law. because the law says he is not liable to answer over to his principle this removing is incumbrance any special property however small is sufficient to maintain this action. a mere depositary is never liable to the bailor unless he has made some gross mistake it is no matter whether the bailee is liable to the bailor is not, the depositary may maintain the action.

40. The Sheriff who has taken goods on an execution may maintain trover against the person who converts them. The Sheriff has a lawful possession against any one except

the right owner 2 Saund 47. n. But N P 33 1 Lev 282

41. If the house of a Lessee be blown down, he may maintain Trover against any one who carries away the timber except the rightful owner because he has a special property in the house destroyed Esp Dig 577. But N P 33. but it is well settled at this day that a lawful possession or even possession under a claim of right gives him sufficient property to maintain the action against all except the owner. ie.

A Boy in the Streets of London found a precious gem he went to the Goldsmiths with and being persuaded that it was of little value sold it to him for a trifle it was held he might maintain Trover however the value of the gem, this was to the rule that the finder of goods has such a special property in them that he can maintain the action, the Bailment being lawful Stra 505 But N P 33, Stra 777. Esp Dig 575. 2 Saund 47, et 3 Mod 332 in one of the cases cited this rule was laid down that lawful possession gives one a kind of property which is sufficient as against a third person

vide Notes p. 481.

42 Trespass is founded on possession (2d) Trover on property (1st). and when one acquires possession under claim of right whether his title is good or not makes no difference for the possible possession is as to all strangers lawful possession is enough, till to entitle one to this action on the ground of mere possession. his possession must have been acquired lawfully or under a colour of title.

If one steals the goods of another he cannot maintain the action of Trover against the one who takes them from him

* 1st and 2d written the alteration by figures 1 & 2 wrong.

If A steals the fruit of B. A can maintain no action against any one who takes it from him 3 Mels 338. 2 Term 47.

43. N.C. A mere right of possession at the time of conversion is sufficient to entitle the party to a right in this action 1 Str Rep 480 1 Salk 68. Esp Dig 576. 7 Term Rep 9.

44. But a property of some kind is indispensable in Trover &c. Where one sent orders to another to deliver certain goods to his servant and he delivers them to the innkeeper where the servant stood, it was held that the delivery was not good and could not maintain this action for the goods if they were lost the delivery to the servant was no delivery to the master a Servant it was merely a change of goods Salk 18. 1 Bulst 35. 36. 3 Ben Mus 86. Esp Dig 576.

45. There is laid down in our Books a fundamental distinction between Trespass and Trover. Trover founded on Property in Fact has in view Property. Trespass begun Trespass & Trover are frequently concurrent remedies, yet still one is founded on possession and the other on property There are cases in which this distinction is particularly important the distinction holds only in point of fact in this case in which the defendant has original lawful possession this fundamental distinction has practically as well as theoretically

46. If a bailee of finder of goods converts them Trespass will not lie. Trover is the only remedy. the Conversion of the goods is practically founded on the property, not the possession for the property is in the bailee. If a Stranger takes the goods of a bailee the bailee may maintain

Trover.

Possession a title against him for his right of possession is a constructive possession as against the stranger Bul N.P. 35 Esp Dig 576. 7 Co Rep 9. Cro 489, 1 Brie 480.

47. In many cases trover and Assumpsit will concur. An unadjudicated Bankrupt may maintain this action against a stranger tho he cannot maintain it against the assignees because he has a right of possession against all persons except his assignees Bac Abr 44 3 Esp 140 Comb 569 Peake Rep 146

48. By the common Law an Ex. or admin. could not maintain this action against any one who converted the goods of the testator in his life time But by Stat 4 Ed III omitted "de bonis asportatis" they may maintain the action. This Statute includes only Exec. but it has been extended to Administrators Cro E 377. Stra 60 Esp Dig 578. 589. 2 Mod 168.

49. There is a great variety of rules in relation to the action of Trover in favour of bailees & Bailors.

50. The Law is well settled that the bailees right is not founded on his liability over to the bailor but on his special interest in the property & as his own as he may maintain an action for it's conversion against all the world except the right owner 13 Co 69, Litt 89 Co Litt 89, 5 Bac 164-5-262

51. If the defendt after conversion tenders other goods returns them, this does not oust the owner of a recovery it goes only in mitigation of damages 6 Mod 212 Cro Jac 118. 2 Blk Rep 902 6 Co Rep 646-

Conversion.

this is the gen rule but when the conversion consists only in the taking & the detainer, the goods to the person in demand there can be no recovery beca when time is brot the action varies, the Trespass but when the taking and that only is the ground of action the Plff cannot be entitled to damages because no other thing is complained of. But in this case if he should bring the action of Trespass for the goods, the delivery of the goods would go only in mitigation of damages

52. A Recovery in Trover vests the property in the Deft but if the Deft returns the property before action brot it goes in mitigation of Damages and does not vest the property in the Deft 2 Ken 1078. 2 Ld Raym 593 1 Show 146. A Former recovery of a stranger will bar an action for the same wrong.

53. This rule obtains tho the Judgmt has not been satisfied by the Stranger. an action cannot be brot Agst one for a tort of this nature and having rec Judgt & commenced a suit against another for the same tort, (tho) though the Deft become insolvent, the Plff cannot multiply actions

54. A recovery in any Concurrent action is a bar to a recovery afterwards. as when Trespass, Trover and Indebitatus Assumpsit an concurrent remedies. now a recovery in the one of these actions is a bar to a recovery in any of the others 2 Saunds 47 n 1

Ld Raym 1217.

5 Bacon 280

Trover.

Against whom the action will lie.

55. Against a wrongful taker & bailee who converts them. The gen rule is that the rightful owner may not only maintain Trover vs the first wrongful doer but against every bona fide purchaser 1 Wils 8. Salk 283 1 Leon 158. 3 Atk 44.

56 The owner has the legal title as well as equitable & they are prior in point of time, maxim, "Caveat Emptor".

57 & Ex. There is an exception by the Eng Laws where the sale is in market overt but a common sale even there, would not be good & takes 33 Geo 3 and vests them & sells them to C who knew of the taking 2 Bla 450. Esp Dig 579. 1 Leon 158.

58 & Ex. But there is an exception to this general rule as to bona fide purchasers. The first wrongful taker alone there is money Bills of Exchange &c. If the money is taken by B & transfd to C. Courts hold against it. 1 Burr 452 477. Salk 126 Ld Ray 738. Esp Dig 580. 3 Burr 1516. 1 Bla Rep 485 this last class of exceptions is founded on property. It would be an injury to trade if the receiver should be bound to know whether the Payer had a good title or not

59 When goods are pawned, the pawner may maintain this action vs the Pawnee, if the pawnee refuses to deliver the goods on payment by Pawner or tender of payt. Cro Jac 244 Esp Dig 590 Salk 522 Ld Ray 916. Bull NP 72

Ex. But there is an exception to the gen rule. When goods are pawned to secure an annuity debt the Pawner cannot maintain Trover without tendring the principal and Lawful Interest 1 Bla 153

Trover & Conversion.

In the case of a mortgage given to secure an usurious debt the mortgagor need not make a tender for the usurious Contr[act] as they vitiate the validity in toto.
The principle is this, the act prohibited by the Statute is not to uphold the contr[act] but to set it aside. but an action of Detinue is a stricti Juris. it depends upon an equitable nature & can act on the case.

60. The donee of goods cannot maintain this action without a complete delivery to him of the goods as if S.S. says to B. I give you my watch, this is no delivery without an actual delivery Bro Abr 57 pl. 2 Lem. 36 but the latter branch of this rule would mislead the mind, if I have given A. power to take my watch, if he takes it the donor cannot maintain Trover unless he retracts his gift before the taking of the watch 1 Bac 289. But there are acts which are tantamount to a delivery as delivering of a key to a room or to the trunk for it delivers the means of obtaining the goods and vests the title completely 2 Stra 955 1 Salk 292

61. One Tenant in Common cannot maintain this act. against his Co tenant - so in case of Joint Tenants and the Coheiress and Joint Tenancy may be given in evidence under the gen issue the possession of one is in law the possession of both Salk 290. 1 Show Rep 658. Comp 450 Esp Dig 586 1 Day 301 - But if one of Two Tenants in Com a Joint tenants commits destroys the chattel the other may maintain Trover & trespass vi et armis

Trover.

Seems such a remedy. Act of one is not done for the other / both Co Lit 200 a. 1 Roll Ab 353. 358. Bac Ab 9. 34

62. But if one of the tenants bring this ac. as a Manager for conveying the property the Agent can only avert the ac. by pleading non Joint of the others in Abatement. Salk 290. Comb 450 Stra 820. 2 Levinz 193. Esp Dig 411

For what subjects may this ac be maintain.

63. Trover will lie for the conversion of all personal Chattels in gen. money, goods, wares &c. Will lie also for a Chose in action. The a Chose in action is not regarded property but as evidence of property.

64. When one sues for a chose in action in Trover he must describe its date the in pleading (of) the written Instrument the date is material. the reason is he must prove the date of the Chose converted Bro Cas 190 n 162 (262) Esp Dig 543. Salk 130. 283. 654. 2 Ld Ray 708. Comyns 117.

The notion formerly prevailed that Trover could not lie for Conv.n of a Chose in action Cro Eliz 723

65. Again it was supposed by a late decision that Trover would not lie for a title deed as pertaining of the Realty but this doctrine is explode 2 Ld R 708. Esp Dig 543. Pollard vs Vinor.

66. But the ac will not in gen. lie for animals feræ naturæ unless it is confined and reduced by law to be value Again if it is not confined it belongs to me as well as another

Conversion.

4 Bac 235. Hut 283. Cro Eliz 125. 1 Roll 5.

67. A Bank is a species of action if converted after they confined. But this action lies for animals tamed & will lie for animals not tamed provided they are confined and are sold & bought & made the subject of merchandize 5 Bac 264

68. This action will not lie for a slave and cannot be sued now in Engl owing to their law. But the same doctrine has been recog in our State
La Ray 146. 1274. Carth 397. 3 Lev 336, 2 ib 201 — Contra 3 Keb. 785. The principle of this Rule is a Negro slave cannot be a subject of property in the person, the being. But may, where the law allows slavery, be entitled to the services. the action is not a case must be an ac on the case "quod servitium amisit"

69. This action will not lie for the conversion of an original record. but it is a public offence. But for the conversion of a copy of record the ac. will lie Hard 111. Cup 8 & 512. 5 Bac. 264

70. It was formerly held that Trover would not lie for money, unless it was contained in a Bag or box or in some thing by which it might be dis-tinguished Cro Eliz 638. 661

But this doctrine is exploded for the reason on which it was grounded was fallacious, the rule adopted was when Trover was brot to recover a restitution of the specific property, and it is settled that Trover will lie for money in this circumstance 1 Roll 5 Cro Car 89. 5 Bac. 264

Trover.

Cro C 818. 841- 71. If a married woman disposes of her husbands property in gaming. he may recover it in this ac a assumpsit- 1 Ld Rd 122 Bul NP 33 for the receiver is guilty of a conversion.

72. But this action lies only for the personal property properly so called. if we sever any article from matters freehold it is not considered as personal Property and Trover would not lie. but trespass. and this rule is as to all fixtures wh even tho they should be in their own & strictly natural personal chattels. if we should draw the nails from a fence. dig up a post from the ground this action would not lie Cro Jac 294. 124. 129. 5 Bac 257

73. If the fellow not carry away the tree of another. and the severing and taking away is one continued act Trover will not lie the Trespass "quare clausum fregit" will.

But it is supposed by this last rule that the severance and taking away is one continued act, one and the same wrong. is not.

74. But if what has been a fixture has been detached and afterwards carried away Trover will lie. even when the last act is done there is a severance Cro Jac 295. is Am.

75. What we propose to mention here would under some circumstances justify the conversion and come under the act as if goods are thrown overboard to lighten a ship in case of a storm. but is not a case. there was a rule of Court in this whom prop. was in 2 Bulst 281 (2,) Bac 258

Pleading in Trover.

1. The dec must always show a property in the Plff as in Trespass must be alleged possession.
2. It is sufficient to say "he was possessed of the goods as his own goods" Ward 111. 5 Bac 271. Stra 1023
3. The dec. must state the place of conversion but is not bound to allege the true place. Mr Esp says the venue must be laid correctly a verdict be found even after verdict but this is not the rule now. and even the misjoin of venues now not ground for bad Esp Dig 588. Carth 78. 2 Lev 30 Under the head of venue I have explained the importance of describing the venue.
4. It is usual using all the precedents to allege a demand and refusal. this formerly was necessary for where in case of a detainer the demand and refusal is but evidence of a conversion and does not supply the necessity of stating a conversion

5. It is also necessary to allege the time of Conversion. for formerly it was matter of substance but now it is not so, but it is clearly aided by verdict Esp Dig 588 1 Vent 135 Cro Jac 428 3 Lev 394 Carth 389 5 Bac 310, Cro Jac 428.
As the law understands an incongruous a repugnant time is aided by verdict. is Mod.
6. The subject matter, & good Quantities must be described with convenient certainty and no more than is Convenient certainty. formerly utmost certainty was requir

Grover.

that is common & settled, & not to be left to the discretion of the Judge. 1 Saunders 114 317 1 Lev 301. Ld Ray 588. Stra 809. Burr 1 B. 37.

7. The words "nine pieces of Green Baize" are not a sufficient description, but "a Library of Books" will be sufficient.

8. Mr Cap says from the rule that there is no need of alleging the value of goods but he is clearly mistaken for it is as necessary to allege value in Trover as in Trespass, he must prove some value, the Omission is cured by verdict Cap Dig 588. Cro Jac 148. 2 Lewin 430. 5 Burr 2795. Cap Dig 407

Pleadings on Part of Deft

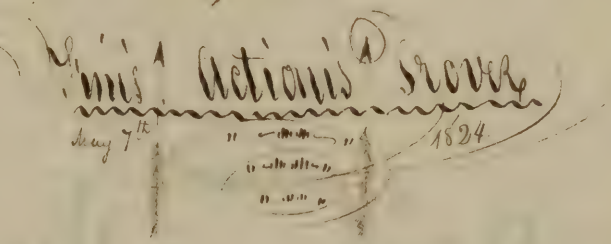
1. It is said in our Books there can only 2 good pleas in Trov. Gen issue & release 1 Keb 305. 5 Burr 2796. Cap Dig 592

2. In the action of Trover many Spec pleadings have been allowed besides the Gen issue &c 1 Salk 198 Cro Jac 78. Stra 1078. Salk 654

3 I conceive the rule is this, that no spec plea at Com L is good unless the release something which is similar in effect to a Release as "accepted & Satisfaction" is a "for ever discharge" in Debt" But a Justification or excuse cannot be thereby pleaded but must be given in evidence under the gen issue. The spec plea of Licence must go to the gen issue and is therefore bad. Vin Ab Trover 198. Cap Dig 593. Burr 48.

4. Any defence which justifies the defts taking, using, or de

Tain't ye d. must be given in evidence under the
gen'l issue. then are Com. Law defens. Now the Stat
of Lim. must be spec. pleaded. as this is not a Com.
mon law defence. in this State we do have held
the Stat of Lim. repeals to Proves. and when Tresspass
and Trover is concerned. Tresspass must be brot
within 3 years while no time is limited to Trover
Our Statute in this State is faulty in this respect. —



Assault & Battery

Assault & Battery

1. The formal denomination is an action of Trespass for assault & Battery
2. An Assault is an attempt & offer to do corporal hurt to another by force but without actually wounding the person. An assault is the unlawful setting upon another without actual beating. Com. Dig Ass: C & B. 3 Blk 120 Esp Dig 312
3. This injury may be committed in various ways by presenting a gun in a hostile manner, & using menacing gesture towards, amounts to an Assault. 1 Vent 256. 1 Hawk 153. 2 Roll 544. An Assault is what is called an inchoate violence a Battery is a consummate violence. Hill inchoate violence never amts to actual personal hurt. 3 Blk 120.
4. An Assault may be explained away by accompanying words so that a gesture which would amount to an Ass! may be explained away by words so as to fall short of an assault. but no Battery can be explained away. If the person moves a weapon in his hand in the act of using his words may explain it away. to constitute an Assault the intention must cooperate with the act Hlod. 3. 10 ibid 187, 2 Hal. 646. Esp Dig 312. An Assault consists of a threatening action. Mere words alone however menacing can never amount to an Assault

Assault and Battery

1 Hawk 135. 11 2 Roll. 1 Bac 154

5 A Battery consists in the actual commission of violence to another. it consists in actually beating the person in any way Esp Dig 312 And the least degree of actual violence committed in an angry spiteful insulting or revengeful manner to a Battery. Treading upon the foot. pulling the nose a Battery in one's face dist? to a Battery 6 Mod 149. 172 1 Hawk 134.

Sir W.m Blk's definition of a Battery is incorrect he defines it the unlawful beating of one. now this may be a lawful battery; the actual beating of another is a battery 3 Blk 120.

6. When the violence is nominal. the manner in which it is done is regarded and decision of the circumstances of the act.

7. But when the violence is actual and seems it is a Battery and give actionable.

8. To make a nominal Battery. actionable the act must be in an angry or revengeful spiteful manner but where there is a real violence done to the person the intention is not regarded only in point of damages. for if one commits a battery in real good nature it is actionable if committed with such force as to appear an injury

9. Now the intention of an Assault is upheld in a Battery & proof of a Battery supposes the intention of an Assault and Battery.

Asault and Battery

10. The Pff alleges in his declaration that the defd did "with force and arms, an asault make, at said &c."

1 Haw. 134 Salk 354

12. Every Asault is accomd malæ, tho accompd with no malice in fact by no means in all cases culpable The rule is that menaces of bodily hurt is many times as if they occasion any inconvenience actual damage, and the same rule applies to a mere asault. Tho in no case presumed where there was an action maintained for a mere asault. A mere asault admits of the same distinction as menaces by words 3 Bulk 120 Com Dig. Batt. C.D. If at meeting B on the highway by an asault a mere menacing words limits B. from proceeding on his journey, this is actionable. If A should hinder B. from entering in his own house B. (and) A is liable for such mere menacing words. & Battery implies damages but from an Asault and mere menaces it does not 3 Ans. 2 Rol 545

13. The injury occasioned (occasioning) by a battery must be an immediate effect of the force employed: but it is not necessary that the injury should be the instantaneous & simultaneous effect of the wrong done, it is sufficient if the injury is produced by a connected train of effects all arising from the same original cause. Any wanton act by which a person is hurt, the injury by a connected

Tho' no special malice in this case.

24. It is a gen rule that when an injury happens in a lawful act or without it is not ac. Lawes in Pleading 125.

25. But in action of Assault & Battery & for any other injury vi et armis the party committing the injury is liable whether he has a good intention or not. If A in defending himself against B & strikes B. B. behind him can action running B. is liable hereto. Judgment for the action 2 Bl. Rep. 896

26. It is not therefore essential to the maintenance of this action that the intent is malicious. a dispute in an injury vi et armis is any one; the object of Assault & Battery is not as a civil action, punishment or reparation for actual damage sustained for if one has suffered from an injury from another that person certainly sustains the loss, whether the offence or this principal a lunatic or a madman or his wife, sons heir neither of them are supposed to have any actual volition. And in Assault & any one shall wish in an action of Trespass that is a civil action the Agent is not punishable this question is very material in the damages damages Cro. Eliz. 130. Yelv 134 1 Strabbeck 81- Doug. 640 649. Esp Dig 399.

27. That what will excuse wilful Trespass has been a subject of much debate

28. The gen rule as laid down, that an inevitable accident or that only will excuse and nothing else

Of Inevitable accident.

Hob 134 3 Mod 377. 2 Bulk 896. 3 Mod 410. Stra 596 1 Sant 81

29. Fortesk says it is sufficient to make one liable if he has been the physical cause of things. This I take to be too broad for if a man should be taken with a fit of Apoplexy and falls on another, it seems he could not be liable. Though he is the physical cause

30. What is meant by inevitable accident I cannot is, that against which human care & human strength cannot guard

31. In Hob 134 there it is said, if the injury is occasioned without fault the Deft is not liable. now in the case of trespass on behaviour, the Act is no fault. yet he cannot be excused, yet in the Ct it was agreed that that which was to excuse must be inevitable,

32. In case of inevitable injury the Defendant is excused tho not justified

33. I conceive the true distinction to be this if the act causing an involuntary injury is itself involuntary the action lies. But where an voluntary acting becomes the involuntary instrument of damage to another if the injury is violent he is not liable as if A. were moved take a sword & throw him on the ground on B. the Reader is not liable because the act of God is not his act, this I take to be the true distinction.

34. Mr Justice Buller says that if a horse used to run away injures on the road is liable for the personal injury. Mr Buller supposes the injury to be in a public street. &c. The ground of this action is

Assault and Battery

neglect - and I conceive the right action to be Trespass on the Case for this neglect. the form of the approved by Bulln & Lennard wrong Bul NP 16. 1 Saund 29

35. Sir says a Trespass to the actions must be voluntary he cites 4 Bac 2092. This is incorrect law. Where an action of Trespass vi et armis by the owner of a dog against the owner of a dog. for the Defts dog having been trained to mischief in Trespass in the case, In this case, Ld Mansfield never mentions the word Case or Notice by Esp.

The distinction the Trespass was voluntary. that of the owner of an animal committing Trespass is not built upon inaction of Trespass vi et armis only he assents to it. but when the injury was not voluntary but committed by the Defts dog Trespass it is very different.

36. When the act cannot damages to another is unlawful in itself the Author of the act is in some form of action liable,

whether his liability in Trespass a Case. (turned this Lawyers over to particularly refer but he is liable in some way. But - if one lets fire to a house negligently and the fire actually burns down many buildings he is liable for all. 2 Bla. Rep 893. 2 Ken. 1574. 48. 12 Mod. 639. 1 Saunders 295. The rules which I have laid down with regard to the effect of accidents apply not exclusively to Assault & Battery but all Trespasses, as in the last rule

Thus far as to the effect of accidents

The Defence may be of 3 kinds. 1st Denial. 2d Excuse & 3d Justification.

1. When the defence consists in denial the Deft will plead Not Guilty.
2. In defence of Battery the Deft may Justify.
3. An Officer may in the execution of his duty justify using as much violence as is necessary: but more than is necessary — 1 Hawk 130. Esp Dig 314
4. But an actual battery is not justified unless there is resistance offered, or attempt to escape: for in making an arrest there is not an actual battery necessary. 2d Roy 229. 2 Stra 1049. Ballet Ni. 19. Esp Dig 314. 4 Mod 78. 299. 2 Chit J. 523.
5. And it is said an arrest purports then here only no resistance but an attempt to escape (battery will justify, no Battery but an assault. The exception is if to an action for assault and Battery the Plaintiff Proves Assault & Battery or to the arrest it is ill. & that the Deft should Justify the assault & plead not guilty to the battery, this Plea not duly correct for "molliter manus imposuit" may be pleaded and be a good defence. The Deft must in such case deny the force and aims when the defence consists only in matter of Arrest. This is stated by Mr Chitty Com. Dig Plea. 3. M. 10. Rex. Off 149. 2 Ch. P. 519. 526 to 529.

After all there is a contradiction in this Plea of Mod, according to some opinion. the Officer may Justify the battery in case of arrest or escape. the he must deny the assault

Assault and Battery

Mr Saund says, the Deft must not justify the battery but deny it and give in evidence "molliter manus imposuit," (Chit Pl 6th Ed 543. 2 Stra 1147. 2 Ken 231. Esp Dig 314. Saund 296. n.1 Cro E 93. 94 2 Ch Pleadg 523. 526 to 529. in these cases cited as per old edition 2 Vol 1795 —

The safer way in my opinion is to deny the Battery & justify & give in ev. "molliter manus imposuit."

6. But under Ass^t & Batt^y they can generally allege more than actually occurred as "maiming & wounding" under such a Com. the Defts when he justifys by reason of which must deny the "wounding & maiming" and give in evidence "molliter manus imposuit" there is a great deal of perplexity on the question. 8 D Rep 78. 294 1 Saund 296. 7.

7. Assault & Battery are distinct in the grounds of the actions of charges at the Assizes Tidd 13. B. has a right to strike at his own option. and this is a good plea.

8. Assault & Battery by the Ass^t and Battery by the 2^d B is not bound to wait till Strokes given or has attempts & menacing attitude Bull N P 17. 18 Esp Dig 215. but B must stand in danger of being hurt.

9. Where it is a case in the Readers Assistant wrongly laid in trespass he says the Defendant in all cases denys the vi et armis and pleads to the whole. but I say he may plead not guilty to the vi et armis but even justify assaulting —

The Case of Saund^s Gen. to be drawn the prec^s of Pleadings & Genl Issue 457 1 Saund 79. 296

Justification.

11. When matter recievable defence made in Case of an assault & Battery. for a slight battery inflicted upon Justice, an excessive battery in return and in evidence it is admitted for to prove the battery as (a Mod 43. But not sufficient to prevent himself from injury

11. If the Plff strikes first and a contest immediately ensues and in the struggles in which both exert their powers. if Plff suffers more than the Deft is justified Talk 642. 1 Sid 246 Ep Dig 315.

12. The Plea adopted in this case is "Son assault demesne" Talk 642 Ep Dig 315. 1 Mod 43. The Rep. replication to this plea is. "that the injury complained of by Defendant was done without the Plffs wrong" 8 Co 56. 1 Bul 76. "absque tali causa" denies the Plea in toto.

13. If the Plff is the blameable cause of the battery inflicted on himself the Deft is sometimes justified tho he did not do it in defence. as when A attempted to tumble over B. sitting on a bench. and caught his fingers in the bench and was injured. B is not liable for the injury. Talk 642. Ld Ray 177. 1 Mod 43.

14. when A. & B. were gambling. B mixed the money on the table all together. & a contest ensued. B was worsted. and sued the action. this plea was held a good defence Co 8 366 Ep Dig 315. here B. mixed (water) the money which caused the contest

15. A. Master may Justify (punishing) his Servt. A Schoolmaster his scholar

Assault and Battery.

1 Hawk 130 A Parent may justify punishing his child, but in all these cases it must not be done with brutal severity, but such as is suitable to the offence (according to some) Opinions were that a Husband may justify correcting his wife but it seems that this has been exploded. 1 Haw 130 Yelv 80. 1 Bac 155 Mr Buller adheres to the idea yet that the Hus may punish the Wife.

16. A man may justify a battery & battery in defence of his wife, a Parent in defence of Child &c. 2 Rol.

17. A Stranger may justify a battery where he sees his fellow mortal in actual danger of some villain &c. Bul N P 18 2 Kay 62. Esp Dig 314.

18. A Servant may justify a battery in defence of his Master. Opinions clash on this subject. But I am fully of opinion that the Servant may justify a battery in defence of his Master. Bul N P 18. 19 2 Kay. 62. 1 Bl K Com. 429. Esp Dig 314. 2 Roll. 546

14. But in all these cases of justification in case of Parent & Child, Husband & Wife, &c. it must appear the battery committed strictly in defence of the party, it must not appear to be vindictive, much less after the battery has been committed. in such case he cannot take the Law into his own hands, 2 Kay, 62, n. Stra, 953, Esp. Dig, 314.

20. So one may justify a Battery in defence of his property, when it is forcibly invaded, if A. land upon the gate of B. B. may justify a Battery. But this must be a forcible invasion, —

Justification

21. If A enters on B's Land without actual force and notwithstanding but remains from it has no right to beat B. he must request B to depart and if B refuses A. may use all necessary force to put B. off. Bull N.P. 19 Salk 641 Hawk. P.C. 132 Cap. Dig. 314.

But in this latter case. the battery in Pleading must not be justified as a Battery but as a "mere molliter imposuit". But there is a modern case which says it may be justified under plea of Battery 2 Roy 62. Salk 407 Bull N.P. 18. 19. Cap Dig 314. 315 388 C.L.C 78. Contra Lutw 1535

26. These last rules in case of property & battery in defence of. concerns the person to be in possession. but where a party has been ousted, & out of possession. he has not any right to use force in regaining possession, 3 Bac 199. 4 Ibid. 148. 2 Bac. 355.

27. At first ousted had a right by Com. Law to regain possession by force. but altered by 5. Rich. 2. Statute of "forcible detainer and entry" we have a similar Statute in Com.t. Stats Comm. 235.

28. Where Statute contemplates the possession abandoned by the owner. not a bare leaving the property in taking a journey. and if one returning finds another in possession he may use force in regaining possession

29. But in the case of personal property the Com Law never allowed the owner, by force, to regain possession. unless the taking was felonious, 3 Bac 4. 5. 2 Roll 565.566 This distinction in the Com. Law. seems strange to me.

30. ——— Provocation by base words can never justify a battery but go in mitigation of damages 1 Mod 6

and will sometimes reduce the claim to bare nominal damages

31. A servant cannot justify a battery in defence of his masters goods — Cro. C. 242. But if they are entrusted into his hands for safe keeping, & persons then can be no doubt but he may justify a battery in defence of them.

32. An Assault and Battery cannot be laid in one declaration with a Contra in de, Lewis 826. Phil Ev 134. But N. P. 80. a Battery is one individible act.
But (in) the Plff may in the same declaration allege different batteries, but they must be in seperate Counts.

33. In an action for a battery the wife the injury must be laid "ad damnum ipsius uxoris," it cannot be laid exclusively either to the damage of the husband, or of the wife alone, Ld. Ray. 128. & 1128. Esp. Dig 316. Mill 782

34. There are various, intendments, rules relating to husband & wife.

35. The Plff may lay in aggravation of damages, in his declaration, many facts, which by law he is not entitled to recover. this is said to aggravate damages Salk 642 Esp. Dig 317.
here the object is to shew circumstances of contempt to enhance the recovery.

36. According to the rules of Com. Law. every Justification must be specially pleaded and cannot be given in evidence under the gen. issue for the defence when it consists of a Justification is inconsistent with the gen. issue. Co Lit 282 B. Esp Dig 317.

Justification.

37. and circumstances attending the transaction, may be proved in mitigation of damages under the general issue. But if special, plead it would have been a complete justification —

Esp Dig 317.

38. It is given out as a general rule, that if the defendant, a battery he must confess it & his justification in all. Salk 637. Esp Dig 318. This rule as expressed may apt & ment misleading me, there is no need of his acknowledging the battery in direct terms. The rules is this, the defendant cannot plead matter of justification without admitting the battery —

2 Chit Plea 523 to 545

The truth is, this rule is an illustration of no more than that the defendant cannot plead specially what amounts to the general issue. A. sued B. in battery, the def. B. pleads specially that he was riding a horse & the horse without his will ran away with him & against the Plff. here he pleads specially what may be given in evidence under the general issue —

39. To the plea of son assault demesne, there is a double replication as follows, "de injuria sua propria absque tali causa, that "de injuria sua propria" is an inducement to the "absque tali causa" the traverse

1 Roc 155 Esp Dig 317.

40. If the Defendt pleads "son assault demesne" and the Plff.

justifies he must plead specially and conclude in evidence the justification under the issue de injuria &c. Esp Dig 317. The reason is, to deny the first assault would be denying the truth in the case.

41. Matter of excuse is or may be specially pleaded a guilty in evidence under the general issue, for matter of excuse goes generally to shew that the Defendt did not commit the act, take the case of inevitable accident in which case the matter of excuse amounts to the general issue because the Defendt is not the agent. Mr Chitty says matter of excuse must be pleaded specially but authority generally contradict the assertion made by him.

Bul N P 17 Selk 634
4 Mod 404 Esp Dig 317 2 Chi 519 N. P.

42. To the plea of "molliter manus imposuit" with a justification, the Plff may reply "de injuria sua propria" i.e. that the act was of the Defts own wrong, than a dissimulque tali causa, but instead of this, Plff may reply "de injuria sua propria" denying any particular fact without denying the whole, omitting "absque tali causa" which goes to the whole plea &c &c. Com Dig Plea 2. 20. 1 Burrow. 320

43. Wherein the facts require it the Plff may still reply in a different form, he may reply admitting the fact alleged and reply that the Defd committed an outrageous battery "absque hoc molliter manus imposuit"

Defences to the action.

this is denying the gentleness of the act and alledging its magnificence.

Gen. Iss. Plea.

3 Bl. 16.

44. In this as in almost all other actions the time is immaterial & not alleged in the declar.

45. The Plff may prove the act committed within the time limited by the Deft plea by the Stat of Limit. 7 & 21 Jac. 1 Ch. 16. Dig. 407. 415. 319. 321. Salk. 222. Bac. Ab. 17. This rule does not obtain in this State for the Stat of Limit may be given in evidence under the gen. issue.

46. The Plea when special must cover all the time within which the Plff might under the gen. issue prove the battery to have been committed. he must traverse his guilt of the act before that day and ever time after.

47. When it a more convenient mode than this, the Deft may divide the time by two distinct pleas and cover it in that way. To this rule that the Deft must cover all the time in the plea. there is an exception when the Plea is "non assault demesne"

3 Bac. Ab. 617

Mead. Ass. 447.

48. Where a day is alledged in the Plff Plea. & the Deft. pleads "non assault demesne, as to the act on that particular day and on that the Deft had committed an assault on a different day. in such a case the Plff. may "traverse" the Plea must be coextensive with the declaration not only in regard to the time, but to the subject matter. It must be an answer in law to the whole gravamen and it must purport to be an answer to the whole.

Assault and Battery.

49. If the D.t does not plead a defence to the whole declaration. the P.ff may sign judgment for want of a plea

50. In battery and wounding if the deft justifies the battery but says nothing as to the wounding it is bad plea Note "Son Assault demesne" would answer all purposes. E.G. In Trespass for assault, battery, and wounding the Deft pleaded that he was constable &c. and for a misdemeanour of the Plff that he had lawful warrant and carried him to the Ho. of C. "quo est eadem tempore &c." On demurrer the Plff have Judgt. for the Plea goes only to the Assault & Battery. Cro Jac 318. Cro Eliz 268 Mendes Rep! 144.

50. C.A. Release recovery in damages, either against the party or against another is a good plea. for the original damages are merged by the Judgt. or recovery. Cro E 30. Bro Ab 319. 116. Salk. 11. Cro Jac. 73. 4. Bac Ab. 28. And this must hold the further damages should have accrued since the former recovery. the battery is the gist of the action Salk 11. Bro Ab 319.

51. It has been a question, when this action is brought against more than one deft whether there may be a prosecution & assessment of damages, as this subject Books differ, the rule is, if two are charged jointly in the dec" and found joint, guilty the jury cannot sever the damages they are found guilty under the general words. and the damages must be joint. 5 Bac. Ab. 299. 116. 5. Bro Ab 320. 321. Cro Jac. 118. This is a legal absurdity in case any damages is made severe, because the act of one is the act of each

52. If in action of Battery wh 2 Defts and joint. one defends

Damages.

the damages must be joint. as these 2 points there are no dissents of opinion. Stra 422. Cro. Dig 420

3. According to Pff's demand from them. if the Defts sever in their pleadings, and if one pleads generally, & the other a special plea. in such case the jury may assess different sums as the defts 2 Stra 1140. Cro. Dig 420.

This cannot be law, however the manner of pleading by the defts after the case, by severing their pleas. they do not sever the act. there is an abundance authority agnst such Law 11 Co 6.7. 1 Saund 207. Bul & N.P. 20 Cro Car 19. Cro Eliz 860. Hob 66. 9 Co. 74. b. 5 Bac 2792.

It seems to be agreed that if the jury find one deft guilty of one part of the trespass, and another of the other part they may sever the damages. for here the act of one is not the act of both Cro E. 860 Cro Dig 420.

4. There is a rule laid down in different terms. Co Litt lays down the rule that the jury cannot sever the damages unless the Defts are found guilty at different times he means this. that if commences a battery on the Pff. B joins and continues the Battery after A has desisted this must be his meaning. and if so it does not disturb the gen. rule — 11 Co 57 Bul N.P. 20. Les. Cas. 54 —

5. But where the jury sever damages improperly. I answer it, such case the deft may arrest the judgt. unless the Pff prevents it, the Pff may (when the jury sever when they ought not to) enter a remittitur on the record against one and take out execution vs the other as both Co. Bul 20

Assault and Battery.

a the Pff may enter a remittitur against one and take out execution with the other agreed with higher damages -

Cuth 420

Bul N.P. 10. 6 Mod Rep. 199. 200. 1 Saund 207. A. M. Co Car 244 243. a The Pff may enter a nolli prosequi against one and take out execution against the other alone for the same or against him, ibi and.

56. In every Case where damages are improperly severed there can be but one Execution 11. Co. 7. A. Cuth. 19. Bul N.P. 20.

57. That the execution can be for only one of the assessments of damages, when the Pff may by Judgt de melioribus damnis.

58. But if the Pff does not take more than one of the sums to prevent error, the Defft may arrest judgt or if not the Judgt will be erroneous 5 Bac 2790. 11 Co 5 - Cuth 19. Lw Rec. 118. Ld. Ray 321, 420.

59. When the Jury [illegible] several damages, the Pff may recover both assessments

60. The Pff in these cases when the damages are improperly severed the Court always arrest the judgt and demand a "de novo" Bul N.P. 320. Co Ca 172. 176. Cuth. 19. Hob 70

61. The action [or] distinction laid down as to severing damages, exists all cases concerning Tort -

62. It was held that in Eng? that a nol. pros. a remittitur entered as to one of several of Co-defts before final judgt against the others, discharged the others, this is not now the Law and the reverse is good Law — Sa 857 Hob. 70. 180 - 1 Saund. 207. B. N. 2. 3 Ld Ra. 511. 1 Wms. 90. 306 Bac Ab. 11

Assault & Battery

63. When an action for assault & battery is main'd agst two defts and the Plff wishes to examine himself & the testimony of one of the Defts he may by leave of the Court strike out the name of one of the Defts and introduce him as a witness.

64. On the other hand perhaps there may be one, who has no hand in the act, but in an Deft in such case if there is no evidence whatever against this codeft. the Ct will permit him, after the evidence of the Plff is closed, to testify if the Deft in any way. because as to him the case is at an end. Bul N.P. 285. 1 Fitz 441. 2 Bac 287.

65. And the jury may if they please find the defendant guilty of a part alleged & not guilty as to the residue. 2 Hale 184 Ex. Cas. 39. 54. Esp 27 421.

66. If the jury at the 1st time find more than is alleged the finding is void quoad hoc. (as to the rest).

67. By the English Practice when there has been a mayhem the Ct may or may not, increase the damages found by the Jury. according to their discretion. and this may be done tho no mayhem is committed in the Ct. provided the judge believes the fact of mayhem.

Assault and Battery.

65. The damages must be increased by the whole court. and the Jury must be in Court to be inspected. 2 Ld. Raym. 1176. Salk. 223. 3 Mod. 332-3. 11 Mod. 5. Esp. Dig. 382.

67. He must prove by evidence, that this action is not for the malicious complaint of Bail &c. 1 Vol. 21. Esp. Dig. 322.

70. The same principle prevails in Ejectment. Here is a remedy for the demandant to have in the declaration, and if the Jury are very attentive. 2 Ld. Raym. 1176. Esp. Dig. 322. 3 Mod. 333.

It is remarkable this wise remedy is not despised in the law. I suppose this time as means of the law, means lucration. Contention, But damages are never expected in any of these cases if the Judge do not think the law is bad, or unless that he is satisfied with the damages. Mich. Esp. Dig. 422

71. I am not informed whether this rule of increasing damages prevails in the U. S. or not. It is not practised in this State. The Jury have no right to assess more than are demanded, but if they do attempt more the Court may prevent error by entering a remittitur on record quoad the excess. Ga. Dec. 297. 10 Co. 115 B. Cartt. 21. 1 Thu. Abr. 642. Esp. Dig. 420

72. It is said in the Books that every battery is an insult and offence. 1 Hawk. 134. 3 Mod. 121. 4 Ibid. 145. 216. This remark ought to be confined to voluntary Batteries

Assault and Battery;

nem. pit. rem. nisi mens. sit rea. By Stat. of this State the Action of Assault is made thus is a particular mode of prosecution Stat. of Comt. Vt. (Dean) "Secret Assaults" P. 407. Revision of 1821.

Era of this Title

Trespass with False Imprisonment

Trespass with false Imprisonment

1. This is an action of Trespass upon the person.
2. Every violation of right & restraint of personal liberty is false imprisonment, the imprisonment may be in any place, & any manner, & there is no time, 2 Str 1167. 3 Bac Abr 127. Dig Dig 326
3. There are two requisites in this action. 1st the detention & 2d the unlawfulness of the detention
4. Any false imprisonment is prima facie unlawful. 3 Bac Abr 127 This unlawful imprisonment consists, in the want of legal authority to detain. this authority may be derived from some legal process or 2dly from some special cause arising from the necessity of the case, as a private person may arrest a felon without writ 3 Bac Abr 127. Salk 408 Dig Dig 333. 4
5. There is one case of illegal Imprisonment, for which there is no remedy at Com Law. which is. a Ships Crew. captured with a ships prize, But this rule is altered. Dig 572. if the ship is an unlawful prize the imprisonment is unlawful
6. It appears that every arrest of a person upon any civil cause whatever is unlawful. It is not so universally in Crim. cases. and so strict is this rule that a Custom of a local nature to arrest in a civil cause is void. 5 Bac 169.
7. The writ must issue out of proper Court in those cases for an arrest under a void process.
8. But a bl of gen. jurisdiction out of Eng. and is not liable in this action, any other, provided he acted within his own jurisdiction 12 Co 23. 4

False imprisonment.

Salk 396 2 Roy 435. Comp. 172. 1 T Rep 563. 513. 514. 534. 537. 8. Cro Jac 320. 2 Blk Rep 1141. in this last case ye indictment all the cases cited.

9. The evidence is admissible against the rebutment or violent presumption of his integrity. the he may be liable to a removal by impeachment &c. so he cannot be indicted! such is the office of a Judge of a Ct of Record.

In this exemption - that any reason of such an exemption from civil liability must exist - in a government there must be one in whom ye supreme trust

2d the extreme impolicy of subjecting a Judge to answer to an unsuccessful suitor.

But this exemption is qualified to this. that the Judge in his official duty must confine himself to that which is within his jurisdiction. for if not the whole proceeding is "Coram non judice"

10. By C. of K.B. this an action and awards the subpoena shall they are liable. "quare clausum fregit" because they go out of their Judicial capacity 1 Hawk. 86. 59. 10 Co. 76

But if they have jurisdiction of the subject matter of the precept. but in their proceedings transgress their authority they are not liable, 10. Co. 76. B. 2 Blk R 1145. Salk 396.

If on an indictment for murder of person & the Court should sentence the person to transportation here the Ct is not liable if they have jurisdiction of the prosecution

11. —— In Cts of Limited jurisdiction the Judges are liable if they transgress their jurisdiction, or authority

Liability of Courts.

By Cts of limited jurisdiction is meant such courts as have a jurisdiction of cases within certain local limits. In this State we have no Cts of limited jurisdiction excepting City Courts and Courts of Probate ——

C. Com Rep 412. 2

Bac 1145. Ld Ra. 454. Stra 993. 8 Co. 114, Esp Dig 331.

12. If there a Ct of limited jurisdiction assume a Cap. cai it is a Nullity. Then the Ct has a jurisdiction of the subject matter. but cannot issue a Capias. and if they do they are liable.

13. But if they do not exceed their authority tho' they come within the generality they admit illegal evidence &c. they are not liable if they have jurisdiction of the matter.

14. It seems Cts of record are not liable for malicious acts provided they exceed not their authority 1 Salk 396 Esp Dig 326.

The difference between exceeding Jurisdiction & Authority is this. By a Ct exceeding its jurisdiction in the subject matter is meant. I mean its deciding upon a question which it has no legal right to decide at all.

By a Ct exceeding its authority which is to exercising some power which the law does not authorize in a case where they have a right to decide on the subject matter. By Com. Law, Cts. not of record are not only liable for malicious wrongs but even for mistakes in judgt & tho' right motives when the mistake injures an individual Cts of record have but little privileges

Stra 1110 710. 1 Blk Com 354. 1 Bur 595 1 T Rep 536 Esp Dig 339

False Imprisonment

15. I have never found a plea of defendant of a Court of Law did, it has been decided that any Court may [illegible] a plea and imprisonment. This is generally speaking a Court of Record, this is not universally true. (they
4 Co. Litt 260. Cath 491. 3 Bla. 24. 5. 12 Mod 486. 2 Bla R. p 1146. All Cts of Record Hale an Ct of Record Ct of Chancery are not, neither are Justices of the Peace Cts of Record in Eng., Of Privileged Persons.

16. The Exec. or administrator cannot be arrested for a debt of his Testator, only in case of a devastavit, and in this case not only the person but the atty. [illegible] the Estate is liable to this action. 3 Mod 388. 2 Bla R 1192. 2 Bla Rep 1142 3 Bla 345 377.

17. Exemption from imprisonment sometimes (always) from the character of the individual and sometimes arises from temporary circumstances incident to any individual, as in case, a Witness attendance on Court, this tho it is not a privilege of the individual but that of the Court and public. 1 Hen Bla 636. 2 Roll 275 8. Mod 534. 4 T. 377. 2 Str R. 1113. 1142.

This privilege of the witness attends to his house, his wagon, and all his necessary baggage, and this protection does not attach merely in going, but while remaining and returning.

However if he makes any unnecessary delay he is liable to an arrest.

But in these cases of Witness & Parties, it is not in the first instance illegal, the Course is, to apply to the Court for a supersedeas until Motion made in proof of his attendance

Privilege of Suitors and Witnesses.

But if the Officer detains him after the expiration of 6 serves he is liable in an action of false Imprisonment 8 T. Rep 584. 2 Bl. R. 1113. 1142. 4 T. Rep. 377. Doug 652. Cowp 9. 6 Co 52. Cro Jac 379

18. They prevail in this State and almost all States a custom, of applying to the Court for a writ of protection. and if the receiving it. the Officer takes him. he may produce it to the Officer and claim his liberation.

19. But when the Suitor a Witness is served with process and his privilege discharges him, yet the writ is not void. 1 Salk 220. 2 Bl Rep 1193.

20. This privilege of a Suitor a Witness is not absolute, for the Ct may refuse giving a writ of protection in cases of collusion. There are but few cases in which the Ct returns the Writ may be refused a writ of protection. when his prosecution is malicious. but how is the malicious prosecution to be discovered until the case is tried? 2 Bl R. 1193. Cowp 9. 1 Ken Bl R. 66. 11 Mod 79.

Nor is the privilege ever allowed when the party entitled requires a recovery. Salk 544

21. This protection extends to arbitrations under rule of Ct. when the are Suitors and witnesses attending. 3 Burr. 89. Pa. 60. 193. or to be more plain. this privilege extends to Suitors and to witnesses attending arbitrations under rule of Ct. It appears that the arbitration must be by rule of Court — if not not the witnesses or Suitors are liable to an arrest.

False Imprisonment.

22. (4 Jac. 1. c. 13.) This act under pain of [illegible] for arresting a person on insufficient warrant. The warrant is alleged to have the seal irregular. The party liable who initiated the suit Doug. 46. 10 Co. 76. b. The Sheriff is not liable in this action. But for making wrongful and unjust precepts the Sheriff is responsible in the Case. 2 Ld. Raym. 730. 8 Mod. 362. 3 Lev. 330.

23. Peers are many other classes of privileged persons as Members of Parliament, Clergy &c. Members of Corporations &c. These are personal privileges only, & there is no Legislative enactment in the United States — unless the party has the privilege granted to him. Under our Constitution the Electors & Officers of Govt are exempt from personal arrest while going, returning & Electing.

24. A Gaoler has a right to retain a prisoner for his fees, but not for his board. On the same principle may Innkeeper may retain a Guest. This is the case tho' the debtor be released from the Creditor. 5 Bac. Ab. 141. 1 Mod. 58. 1 Vent. 237. 1 Ellob. 132.

25. If a Precept or order of Court issued to confine a person in a certain prison the Confining him in any other prison is false imprisonment. 3 Salk. 219. 5 Mod. 290. Ld. Raym. 262. Stat. 16.

26. A peace officer is justified in making an arrest on a mere charge of Felony without warrant, and tho' the party accused is acquitted, for this only to arrest a suspicion Dory 334. 345. 1 Roll. 43.

27. With regard to arrests for felony by private persons This is to be regarded. If a felony has been committed, any private individual suspecting another on reasonable ground, & without malice

Validity of an arrest.

he may arrest without warrant -
But if there had been no felony committed but only a report & the party arrested him on reasonable suspicion the party arresting is liable 4 Dig 334.5. Hawy 345 1 Rast 96. It would be otherwise in case of a peace officer.

28. So any private individual may arrest another without warrant to prevent a breach of peace or an escape, so if A sees B escaping & attempting to escape from prison A may arrest him. 2 Hawk. 82. 1 Bulst 150

29. An original arrest on Sunday is void, this does not extend to a recaption. 5 Mod 95. 2 Lewis 111. 2 Wils R. 1195. Esp Dig 327, 415. An arrest on Sunday by Com. Law is not void -

30. Special Bail can at libety at any time take & retake their principal & commit him to prison, this may be done on sunday. they have a right whenever they think proper to take & commit their principal to goal. Salk 636. 3 Salk 148. 2 Esp Dig 135

31. Bail to the sheriff have no right to arrest their principal on Sunday. constant custody is not required in civil actions - & this is different from special Bail therefore 2 Bl R 1273.

32. In civil cases an arrest by breaking the doors & the windows of the defts mansion house subjects the party arresting. 5 Co 93 Comp 1 Wils 62. 2 Bac Ab 36, Here the arrest is unlawful yet the party may apply to the court for a discharge & they will discharge at their discretion -

33. It has been determined in this State & the State of New York that special Bail may enter a Bail piece granted in

on Hab. retake the principal in any other State —
See Hen. & Gouldes Junior in Esp. Rep. Days Ed. 172. N. 5. Vo.
3 Day. 485. 7 Johns 145. Court of Errors June 1819 7 Johns. 145.
It has been determined in England to the Contrary.
It has been determined in this State that a Justice by virtue
of an Escape Warrant may retake the prisoner in any other
State 1 Root 107. The officer has in this instance been
on the Pursuit, the Escape Warrant conferred no authority
out of the State in which it was granted —

34. If an Officer having a precept, Warrant against A. & by mistake arrests B. the officer is liable in this action
But there is case in Eyles Book which goes further, that
the officer arrests for B & A. told the officer he was the
person. but it was held the officer was liable if he arrests
on this false declaration. Esp Dig 328. Day 42. 1 Roll 552.
This Doctrine is not Law, But it was said in this case
that A. should recover in mitigation of damages.

35. ——— the officer will be subjected to an action of False Imp.
as if, Statute prescribes the body of the Deft in mesne or final
process when there is personal property tendered, this
is by express proviso of Statute this is not the rule at Com. Law
1 Root 120

36. Femme covert are entitled to be discharged on Habeas when
arrested with her husband on civil process. She must
be discharged at any Rate on nominal bail. 2 Strau
1272. 1 Cr. Rep. 481. 1 Bl. Rep. 420. 1193.
But this is no case where Femme covert can have an action
of False imprisonment for an original arrest with her Husband
& I know no other that an action in such case can be
retained. If Feme the must be discharged on Nominal Bail
She cannot be detained.

Validity of an Arrest.

2 Bl Rep 1093. 1094. Doug 648

37. Arresting and confining for a reasonable time under a general warrant of a Justice of the Peace for the Purpose of more examination is not actionable 5 Bac 172 1 Hall 166.

38. Any person may justify arresting without warrant and confining a person who appears of disordered mind as a Lunatic
5 Bac 172
But with regard to Officers acting under process, there is some distinction to be observed.

39. If an Officer under an authority of the Ct of Limited jurisdiction when upon the face of the process it appears the Court has not jurisdiction in all respects, he is liable if he arrests on such process.
If a City Court issue process stating that the action arose out of the City and the Officer arrests on this process he is liable. Bul N.P. 82. 3. Hard. 480. Esp Dig 391. 10 Co. 76. 7. which is the leading case. Cro Jac. 314.
This rule is denied in 2 Roll Rep 230.
This rule applies in its terms only to Courts of Limited Jurisdiction
6 Co 54. a. 3 Mod. 346

41. If a Ct having jurisdiction of the matter, issues process or a person privileged to be sued in some particular Ct but not in the Ct issuing the process, in this case the Officer would be liable. Yet if in a Ct of general jurisdiction as the Ct of Com Pleas a process in this matter should issue, the Officer would not be liable. for he is bound to observe the Courts of higher & general jurisdiction. Vide 4 Co 6 b 48.
In Coke it was held that the plea would be bad in the first appeal. Even tho the plea that it out of jurisdiction did not appear on the face of the process. 11 Co 76. but this doctrine overruled. Cro Jac 314 Esp Dig 334.

you will see this rule confirmed by in — 2 Ray 230-
Stra 710. 903. 509. 2 Nils 385 — 4th. I do not see reason
to be Law. it is unreasonable and inequitable —

41. But still the question arises, if a person commits an outrage
that when any Ct has jurisdiction of the matter and the def-
-endt in the jurisdiction arrests from something Local or per-
sonal in, and comes the Offr is justified unless the defect
appears upon the face of the process. Bul N.P. 82. 3. Hawk.
486. Comyns Dig. Imp Dig 3 & 1. In following case with a strictly analogous
proceed upon this rule — 2 Ellsworth 190, 29. Stra
710 Cath 274, 6 Co 54 a. 2 Rich. 705. 344,
The opinions agree that if the defect does appear upon the
face of the process the Offr is liable, But in the case of
2 Rich 703-1- it was held the Offr would not be liable even
in that case if the defect appearing upon the face of the process,
42. the Offr may justify under the Ct if that Court has
the process be void, provided the Ct have jurisdiction
of the subject matter. the legal nature of these Courts
justifies this, except when they have no jurisdiction,
11 Co 44 a. 3 Nils. 345, 10 Co. 76,
43. (Qu.) We have adopted in this State a very simple rule as to this
What a ministerial Offr is justified in all cases from
whatever Ct it issues, unless the invalidity of the process
appears upon the face of it. so in this State there
is no distinction between Cts of Gen. & Limited jurisdiction
Kirb 110. 182. The authorities being so complex and contradic-
-tory on this subject, some permanent rule ought to be adopt-
-ed in every State, as in the State of Connecticut,
& many cases he is protected. Those distinctions so far
as they limit the Offr do not extend to the
Participation of the Plaintiff

Of void Process.

14. The process of Ct Limited Jurisdiction in many in Force, when it does not the Writ

Co Jur 314. 3 Bl R 883. 2 Mod 196-7.

15. When a Writ is a defective process is used, the action is not barred, that the party arrested, had pleaded to the first action, his appearance is no waiver of his claim to an action. But Bl R 883 Esp Dig 330. 1 Vents 369, 2 Lev 260.

16. In some cases also process is void, and the party proving it out is liable, when the jurisdiction of the Court is complete in all respects. either of the subject matter, person or place.

17. In case of limited Jurisdiction when an authority of Statute is not strictly pursued. there is no justification to acts done under it. 8 Co 114. Salk 408. Show 710. Esp Dig 331. 337.

When in Legal when a justice committed a person under the game laws. when the party had sufficient effects to satisfy the penalty, it was held the justice was liable, and a Jolt in the Writ. 1 Wils 153. Esp Dig 332.
Where a limited authority given by Statute. the Statute does not allow imprisonment when the party has sufficient effects to satisfy the fine.
In this class of cases the Ct Judge is liable or else as the party procuring the imprisonment. generally as in the case of Comm. of Bankrupts. when they exceed the authority of Statute. 2 Bl R 1035. 1041 Esp Dig 331.

18. But there is a more comprehensive class of cases. The process of any Court, whatever may be void in respect of any Question of jurisdiction. that is void for ir-

egularity, and in such case the Sheriff is liable for false imprisonment. 3 Wils 341. 2 Lil 750. 2 Bl Rep 845. 3 Wils 345.

49. But if the precept was issued by a superior Court of general jurisdiction, and it is irregular, the Officer is not liable but the Party is.

tho the irregularity appears on the face of the precept, if issued from a Court of general jurisdiction, he is not liable, but he could be if issued from a Court of limited jurisdiction. 3 Wils 345.

50. But if the Officer executes a precept that has issued from a Court of superior jurisdiction, that has never been set aside for irregularity, he is liable if the precept after it has been set aside

King 63. 2 Bl Rep 835, Shaw 198. 15. St. Ch. 12, 615. 11. Co Litt 509.

51. But Provided suppose that an Officer may serve a precept after it has been set aside for irregularity without precept's being set aside. in such case I should judge the Officer not to be liable according to the general.

52. When an original arrest is begun, the Officer a party making this arrest may make himself liable by any negligent or improper, & outrageous abuse of his authority. as when an Officer after taking the party in a civil action, confines him in a dungeon, without light and comfortable subsistence

Esp Dig 332 1 Term Rep 536

53. And this action may be had against a magistrate issuing the precept when he is the faulty cause. as Ans. An arrest under a precept founded upon an irregular prior proceeding is void — If an executor is irregularly

Erroneous and Irregular Process.

an arrest under it is void. so if a Judgment is entered irregularly & execution issues thereon regularly. yet the arrest would be void. 3 East 128. 1 Stra 509. Ray 73. Esp Dig 329. 341. 1 Wils 345. 155.

But the Officer, executing such irregular process issuing from a Superior Court, and before it is set aside, is not liable tho it should be afterwards set aside, Ray 73. Esp Dig 321. 15 East 615. 1 Lev. 95.

3. But an arrest under a process merely erroneous, is good for erroneous process is valid & regulates until set aside by due course of law. Stra 509. 710. 3 Wils 345. Esp Dig 391. 2 Ld Raym 231. Ib. 455.

And this rule holds in favour of the Officer as the erroneous process as well as the Officer who executes it, is bound

What is meant by irregularity in process

1. When an improper order has been made in a matter

There is a great difference between Erroneous & Irregular process. The effect of an irregular process is, that it is always liable to be set aside in a summary way in the Court

2. Process has been held irregular and void when issued or executed without proper authority, thus in Ld Hawkins the Officer left a blank in the process a warrant to be filled up by an Atty with the name of the Bail & held void - 2 Wils 47. Esp Dig 329.

And in this case the Officer would on the Atty's application on making the arrest and also the Officer if he was privy to it.

3. Process is said to be irregular, void when it is issued informally. That is under circumstances which do not a

False Imprisonment.

a court to sue, & the University of [illegible] there is pursuing him. If matters fall out so that a defendant running away and the sheriff lose his debt, the sheriff may make oath that he suspected the defendant would run away and thereby lose his debt upon which the Vice Chancellor issued a warrant, & the imprisonment, the sheriff may make oath &c. Ld Raym 992. Cro Eliz 329. 2 Mod 385.

Hen. said the sheriff and goaler would have been justified if they had not joined with the others in the plea. I think strange way for two reasons. 1st the precedent

2 The vice chancellor had only a limited jurisdiction and had no jurisdiction beyond his own parish & could not consider with the sheriff.

4. A writ is held to be irregular, when it is not returnable on a day certain, and it has been decided that a writ issuing from the Marshalsea Court in the form "Tunnall" to the next Court of the Marshalsea, is irregular & void. This has been doubted Ld Raym 314. Salk 81. Cro Eliz 330. Carth 21-2. 2 Mod 58

5. But this rule applies only to mesne process it does not hold to final process. The time of returning the final does not at all concern the defendant, it does not require his attendance. Carth 21.

6. Another class of illegal arrests are those made under general Latch warrants. A gen. Latch warrant is always void. A warrant directing the arrest of a person committing a certain trespass without describing is void. Cro Eliz 399. 2 Mod 275.

Requisites of a Search Warrant

1st The warrant must be granted on the oath of the party complaining. 2d The party must state the grounds of his suspicion. 3d The warrant must be executed in the day time. 4th It must be executed only by a known public Officer, not by a private Officer or person. 5th It must be executed in the presence of the Owner. Finally the warrant must be directed to a particular place or person. Now all these requisites must be complied with or the whole will be void. The act of the requisites be conformed to, the Officer is justified or not by the event of the search If he finds the goods he is not liable. but if he does not find them, tho he complies with all the requisites he is still liable. 2 Nels. 291-2

Ld Raym 399. — Swift doubts the liability of the party in failing to find the goods. if the party acted without malice. 2 Nels. 291-2

But if all these requisites are observed the Officer is excused whatever the event may be. Notwithstanding the Officer is under a duty, When an Officer justifies under process he is bound only to shew the process duly. If it is a mere writ and the law does not require, he must shew that it has been returned. 6 Co. 52. Bac Abr 333. 337. Stra 1184

Return of Final process.

If the process is final he is not bound to shew that the process is returned, Comyns 20. 5 Co 90. A. 4 ibid. 67. A 1 Mels 17. tho' an under sheriff is not obliged the return of the process even tho, it be a mere process, for by Com Law. he as an under Sheriff is not obliged to the return, but with us. he must shew a return,

False Imprisonment.

3. Als the Offrs is bound to shew it that he was an acting Offr. this is only primâ facie evidence and may be rebutted. Stran 1006. 3 Salk. 232. 4 Mod. 366. 2 Mod. 185.

4. But when an action is brot against the Offr. in the proper wch the arrest is made. he must shew the judgt on which the proces issued was void or the proces itself. The Law regards more of the Offr than of the Offrs 1 Salk 408. 9. Esp Dig 333-4.

5 And the same rule holds as to a third person who procured the arrest in favour of the Offr for is not a case he takes the Offr plea. still if the third person is used as aiding the Offrs at his request and is bound to save him. he is not bound to prove more than the Offrs Salk 408. 9

6. If a Bailiff having made a lawful arrest and be not return the writ when by law he is bound to return he may be subject as a trespasser ab initio Salk 409. Esp Dig 232. 2 Roll. 563

I do not think it correct to say that in a doctrine the trespass arises by relation. It is not the Duty of the Officer, to whom one be made liable to be sued by authority of law. unless it be a misfeasance

If he does not return the writ according to the legal exigency of it. the writ ceases to be evidence

7. When the Regina Offr and the Offrs are sued together they may either join or sever in defending but if they join in the same plea and the defence is insufficient as to either of them it is insufficient to both of them

Liability of him who aids or assists.

It is thereby necessary for the Officer to swear in his defence for his own benefit. 4 Inst 193. 1184. 509. Bish Dig 336. Hil. 17.

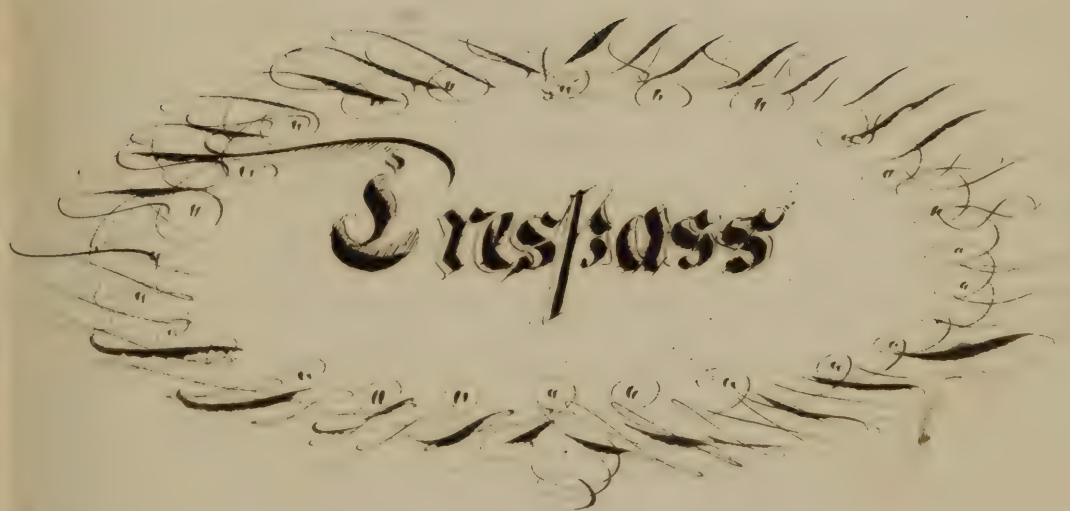
8. When are other cases when the Officer is liable when the Officer is not, as by abusing his authority &c.

9. Procuring, commanding, aiding, or assisting an make the person a joint trespasser with the immediate agent. 1 Salk 409. Co Lit 57. a.

10. And a Servant who assists his master by his masters command in unduly imprisoning one. is liable jointly & severally. Lit. Master & Servant. 3 Hil. 377. Co. Lit 57. a.

11. And it has been resolved that where a person procured a foreign Prince by intimidation & unlawfully to imprison another the procurer was held liable. 2 Bulst Rep. 483. 1055.

("End of this action")


Trostspruch

ك مكتبة الإسكندرية

Trespass for injuries to Personal Property.

1. The term trespass in its most extensive acceptation at Com Law. means any transgression of Law. Mode of Treason. Felony or misprision of Treason. 3 Blk 208. Bac. Tresp.
But in a less comprehensive sense it denotes any civil injury committed by force, to the injury of one's person or property. as Assault & Battery. False Imprisonment. and all forcible invasions of one's property real or personal Esp Dig 380.
2. But the class of Trespass now to be treated of. comprehends all injuries to the personal property of another. Vi. Armis to real property. Vide Viz. Tresp quare clausum fregit.
3. Personal Property in possession is liable to two species of injury 1st. To abuse & damage while in the possession of the owner 2d. To Conversion. & depriving the owner of possession
4. Personal Property in possession may be injured in various ways. without a change of possession as beating wounding poisoning or any forcible act which destroys or diminishes the value of the chattel 3 Blk. 153.
5. For all forcible injuries to one's person or property where the injury is direct the remedy allowed by Law is Trespass vi et armis. 3 Blk 153. 2 Roll 556. Esp Dig 598.
6. This action lies only for such direct injuries as are committed with force i.e. where the injury complained of is the immediate effect of the forcible act. For if the injury is consequential the action must be "trespass on the case" for this see Viz "trespass on the case."
If A shall erect a nuisance in the street as by throwing a log in the way. if in the act of throwing it should fall and hit B. or his horse the injury is direct and this is the action. But if after it had been thrown B. or his horse be a man is

the injury would be consequential and Trespass or the one would be the proper action.

7. If the Party mistakes his remedy between Trespass and Case the fault is radical & incurable not cured by verdict 3 T.R. 125. 2 Bulst 191. Bac Abr 141. & 196.

The reason of this depends on the common Law distinction in the damages in the two actions Judgt in Trespass was 'at peradventure' or the party was arrested and imprisoned the Jury could find the damages &c' but the judgt is a miscarriage But tho this reason has ceased the distinction remains.

2dly Of Property.

1. This species of injury done or remedied in this action consists in the unlawful taking of another goods way. For an unlawful detainer of one's another goods is not properly Trespass. Detainer is never so, and an unlawful taker is never so, except in the case of a subsequent destruction of it.

2. When no one is in lawful possession of goods, as when he's trust by unlawfully detaining & abusing them the remedy against him is Trover & Detainue. for Trover is but an act of neglect to restore him is a non- & not a mis-feasance 3 Bulst. 152.

3. This action is not brot for a specific restoration of property but to recover damages, to obtain specific restoration detainue is the proper action.

4. There is a class of cases in which Trespass will not lie in a Common Law Court, for an unlawful taking and in the case of the unlawful taking of a ship in port and this tho in a Ct of Admiralty the thing has been adjudged a prize, for the question of prize or no prize is to be tried

cognizable in a prize Ct. a Ct of Admiralty Doug 572, 578, 588.

5. But the general rule, nothing will. There are cases when tho the original taking was lawful yet by a subsequent abuse this action will lie. This is when the authority is given by the Law itself, a subsequent abuse of that property makes the party liable ab initio as a trespasser, and he is charged with a forcible taking and carrying away, tho in fact the taking was lawful as if one distrains a beast damage feasant, and puts it to work, this subjects him in this action. Bro Ja. 147. 8 Co. 146. 3 Hen. 20, 1 Bro. 20. But N. P. 81.

So if a Bailee enters an Inn an Agent from the Landlord he becomes a trespasser ab initio, tho the entry was lawful the subsequent subjected him.

Should a Sheriff wilfully destroy goods levied by him on Execution, he would be liable on the same principle, In this class of cases he is made liable by relation. Salk. 221. 8 Co. 146.

The principle of this is that in every such case that the wrongdoer is supposed to have done the original act for the purpose for which the Law warrants him in doing it. Not that he might commit the subsequent wrong

6. But to render one a Trespasser by relation the abuse of a license of Law, must be a positive act, it must be itself a forcible act, for had the traveller refused to give possession, it being a mere nonfeasance, Trespass would not lie the Party is remedy 2 Bac 812, 8 Co. 146. b. Esp Dig 380.

So if one having made a lawful distress refuses on tender of amends to redeliver, now trespass is not the remedy for the nonfeasance, in such instances Case is the remedy where detinue

will not lie. 2 Roll. 550. 1 Ib. 90.

7. Here is one case improperly classed with those depending on the doctrine of relation. It is a rule that if a sheriff having taken any person or property on mesne process does not return the writ within the time prescribed by law, he may be subjected in this action for the original taking. Here the wrong is but an omission and yet by many it is said he is guilty of Trespass by relation. It is true he is guilty of a Trespass but this depends upon a rule of evidence. For if he neglects to return a writ according to Law it becomes a mere nullity and is no evidence of his right to take under an attachment. so that the seizure cannot appear to have been done, under a license or by order of Law. 5 Bac 162. 160. 2 Rol 563. La Ray 632. Salk 409.

8. But when a license to take property is given by the owner to one who takes under the license can by any subsequent wrongful Trespasses abenitio, this is true as a general rule tho there is one exception. If A lend B a chattel and B. abuses his trust tho the act is forcible & can maintain Trover but not Trespass. the case is the proper action. (But when a license is given &c.) Parkh. Dec. 191. 8 C 146, C. Yelv 96. 7. Dr Leon Comyn. 5 Com. 581.

The reason of the distinction between a license by Law, and one by the party is that the law when it gives to one a right over the property of another takes care that it works no injury. hence if such subsequent wrong is done the law regards such act, as contrary to the license given for the purpose intended (and) but as a means for effecting an injury. but if the Party grants a license he must take care that he makes a safe bargain for he does it at his own peril. This holds in Bailment, for if the bailee abuses

his trust the bailee remedy is "case" Detinue &c. but not Trespass. But here is one exception for if the one entrusted with goods should wantonly destroy them Trespass would lie for such a flagrant act. extinguishes the contract of bailment. for says Ld. Coke. "It shews an original intent in the Deft to injure the Plff" Ld Lit Sec. 71. 6 Lit. 57. A. 3 Co. 13. b.

Who can maintain this action?

1. He who brings this action must have been at the time of the injury done, in possession either in fact or in law. that is, his possession must be either actual or constructive, But it is not necessary at the time of action brot. that he was in possession 17. E. 480. 7 Ed 2. 4 & 489. Cro Eliz 383

The question would suggest itself, why Property would not support this action, as the description requires property only in the Plff. The answer is that this action was not framed for an injury to the Property, but an injury to the possession for injury to the former the Law has furnished different remedies. thus A. sells Goods to B. for 6 months. to be used by him during that term. A stranger takes the property from B. A during this period has not this action as the stranger for he has neither the actual or Constructive possession, he would not have the power for that is in B. neither the latter, for during the term B has the entire controll of the subject bailed. neither after the elapse of the time could he have Trespass. for the injury during the term, for the possession at the time of the injury was in B. when J. S. threatened an Execution on the property of the Lessee. it was held, that Trespass by the Lessee or the J. S. could not lie. 11 H. 4 39. 7 H. 4. It was held that Trover would not lie. Ths. Ld Kingston in a letter

case said that it would.

2. Constructive possession, at the time of the injury done will give him this action against a Stranger. By a constructive possession is meant a right of present possession, as if at bail goods to a man peculiarly having the right of demanding at any time then he has the constructive possession. The same may be said of goods taken &c. from a common Carrier, here the bailor has the right to the goods bailed at any time by paying the stipend a charge of transportation 4 Y.R. 489. 7 id 9. 13 R. 480.
But yet if the bailee a carrier had converted the goods the bailor could not have this action.

3. It is a General Rule that any person having a general Property may have this action. vs a Stranger for the possession. drawn after it in contemplation a constructive possession, as vs all Strangers. Latch 214. 2 Bulst 268. 1 Sid 438. 2 Rol 569.

4. This General property contemplated however must be accompanied with a right of present possession, a right either absolute or conditional otherwise he cannot have this action but it must be brought by him in possession.

It is held in such case that having general Property at the time of the injury done he may support a special action on the case for the injury done to his reversionary interest, as in the case of bailment for 6 months, before mentioned. 1 Ch Plea. 167. 3 Leo. 209. 359. 2. Phil Ev. 133. 8 John. 432. 11 id. 385.
A pawns goods to B. to secure a debt redeemable in Christmas and not before, now during this time the pawnee has the right of possession vs the pawnor and if the goods are taken from his possession during the time the pawnee cannot

have an action of Trespass against the one for taking them. because the actual and rightful possession of the goods was in the owner at the time of taking them. Now an action on the Case would lie because it does not require possession either in fact or in Law at the time of the injury to maintain it. being an action adapted to the circumstances of every case. Possession is not an essential ingredient to the maintenance of it as it was framed to afford a remedy when there was no possession.

5. There is a fundamental distinction in all the Books between trespass and Trover. that the First is founded on possession at the time of the injury done and Trover on property. Bul 35; 7 T.R. 9; Esp Dig 578.

There is no distinction which is less understood than this and Sharpe in his digest wholly denies the distinction, he says the foundation of both actions are both alike fencing in all cases, and that the Plff must have the possession either actual a constructive, to sustain trespass. and without the Trover will not lie.

It requires much attention and critical distinction and examination of cases to understand what the distinction amounts to. Still there is a manifest distinction. The confusion has arisen from not confining the rule to its proper limits. The distinction holds no further to produce limits than this. Where the deft denies possession, we lose the rule that Trespass is founded on possession and Trover on property. This precisely as in Replevin Bailor and Bailee and this has been amply given the reason to this particular case E.S. of Bailee good to B. of Bailor compelly detains them of above his title, & can maintain Trover against him. but he cannot maintain Trespass

except in the case of wanton destruction which is an exception to the general rule. Even the bailor has been held because he has the general property so against a finder of goods the owner may maintain trover having the general property - but as the possession is in the finder he cannot be entitled to trespass for the finder by the act of finding was by law and in fact the possession and the owner has a right to demand them yet the act of demanding does not vest the property so him in possession.

But as between the owner of goods and a stranger the distinction does not hold as if there is an actual or constructive possession trespass will lie as the wrong does in favour of the bailee and if there is not trover will not lie for the actions are concurrent 1 T.R. 480, 4 T.R. 489 So that if goods are bailed for a limited time and during the time they are taken by a stranger neither trespass or trover could lie as the wrong does in favour of the bailor.

In point of fact - form & mode of pleading, the distinction is immaterial. He who has a special property in goods to get him into the actual possession may have this action as a stranger.

6. If it is said in the Books that most bailees may have this action as a stranger I think it to be settled that all bailees may have it. For lawful possession entitles me to this action for it implies some degree of interest and it being accompanied with the actual possession makes an injury to him, hence a hirer or common carrier a pawnee or borrower or even a depositary, may maintain this action

7. So also may a finder of goods for tho he has but a special interest, as to preserve them. Yet he has sufficient as all strangers to Ld 894. 1 Salk 84. 2 Saund 47.

8. An agisting farmer has this ac. vs one who injures his agisting cattle.

Who may have this action?

9. If the bailee of goods delivers them to a stranger the bailor cannot have this action vs the accepter, for there is no trespass in the act of accepting for he receives them from one having the lawful possession. But if the bailee had no right to deliver them, the bailor after demand and refusal will maintain trover. For then the wrong is but a mere detainer after demand. 5 Bac 164 175. For more on this head see Tit Bailments.

Who may have this action?

1. When goods are sold or given to one he may have this ac. vs a stranger before he himself has had the actual possession for the donor or vendor has no interfering right he being a mere depositary and the donees or purchasers may properly carries after it constructive possession
In gifts more is required than a parol gift & there the vendee or donee before the delivery cannot have an action of Trespass vs the donor or vendor for the possession of either was originally lawful and a refusal to deliver does not constitute an unlawful tortious taking but a detainer. The proper remedy here is Trover or detainer, Latch 214. 5 Bac. 164
2. If goods belonging to a testator are wrongfully taken before probate of the will the Ex.r may have this action either after or before the will is proved, if he has the probate before he declares. For the Court of probate confers on the Exec.r their interest only which the will confers. and as he had the rights of property he had constructive possession. 2 Bulst. 268. 17 R. 480. 5 Bac. 164.
3. A Legatee of chattel goods may sustain this ac. for a trespass after the Ex.r has consented to the legacy or for all trespasses after the assent. But not for a trespass before the assent.

Trespass.

for at that time the legatee had no legal title But
even after the Assent the legatee can have no action be-
fore delivery unless the legacy is specific. For if not spec-
-ific. before delivery there is no identifiable property in the
testator devised to J.S. goods & chattels to the amount of
a thousand dollars, now till the goods are delivered
there are none specific which he can call his own, it is no.

4 If property for goods is brought belonging to two persons, join-
-ly both must join in the action and if one sues alone the
Deft can defeat the action by pleading the non-joinder of the
other or others in abatement. But it is a defence only in a
-batement for if he pleads the general issue the Plff will prevail
for it is no defence to the allegation of taking the goods of the Plff,
Salk 32. 3 Lev 354 Esp Dig 580. 2 Ld Ray 323. Contra Salk 4. not Cond.

5. But there are cases in which the action of Trespass will not
lie. All wrongful acts amounting to felony as if A steals
from B, B can have no action by the Com. Law. for the
civil injury is merged in the public wrong 1 Lev 21. 47-
Cro. 90. 1 Mod 283. Hay 82, Sanct 144. But N.P. 131.
The reason of this is that by the Com Law. felony works
a forfeiture of all goods and chattels and if followed
by attainder a forfeiture of the property also. this exceeds
all idea of redress by civil action,
In Comm. the notion of merger is not recognized and
a civil action is in contemplation of law no crime
works a forfeiture of our property. (Works)

1. In describing this action the goods on which the trespass
was committed must be described with convenient certainty
The Plff of goods, proved by all means be stated. For to ch.
also one will taking and carrying away the Plff goods.

is not sufficient and is ill, nor is it cured by verdict. So a recovery on such a declaration is no bar to a recovery on another. And it is necessary also that the Deft. may know for what goods he is to answer. Esp. Dig 405, 6 Ba Abr 1410, 4 Bac 2455, 5 Co 35, 2 Roll 637.

2. But this rule of sufficient certainty in the description holds only when the Act is laid for an injury to the goods themselves & where that is the gist of the action. But when the taking and carrying away is laid only by way of aggravation it matters not how gen. the allegation is. as if one says in his declar. the breaking and entering the house without the gen. allegation of taking and carrying away the goods. now the breaking and entering the house is the grievance. the taking the goods a matter of aggravation and a recovery here would be no bar to a recovery in a subsequent action for the injury to the goods or the goods themselves. 3 Mod 292. Esp Dig 496.

3. But a description is sufficient if it is made particular by reference to some thing else in the declaration which is particular. 3 Mod 292. Salk 543. 1 Ventr 114.

4. There are certain sorts of trespass of a permanent nature which may be laid with a continuando for injuries to personal Property. for a continuando vide Gil. Pres. 2 vide clausum fregit Salk 638. 2 Ray. 739. 3 Blk. 212, Esp Dig 310, 407-8.
And it is necessary to know when it may be best with a continuando. for if an injury is laid with a continuando which cannot be thus laid according to the rules of pleading the fault is in the act not aided by verdict. Salk 639. Esp Dig 408.

5. It follows from the foregoing rule that the Plff must

always allege his own possession of property shewing a right to possession, at the time of the injury done. But it must appear from the face of the declaration that the Plff had either the actual or constructive possession for this action is only to redress injuries to the possession. Salk 640, Cro Jac 46, 6 T.R. 490, 1 id 430, 2 Lev 156. "That the Deft at a certain time with force and arms took and carried away a certain quantity of hay from the Plffs land" was held insufficient for it does not follow that the hay belonged to the Plff because it was on his land it is ours.

6 It is necessary also to allege the value of the goods but not state the true value. but he must state some value to shew that he suffered an injury This was intended as rule of damages, yet it is not in a Ct. but the Jury at all the same holds in Trover, 2 Lev 230, a 230, Ca. t. 29, 1 Vent, 114. 317, Esp Dig 407.

Esp Dig in his argt page 587-8. says that in Trover the value need not be laid. This is a clear and flagrant mistake and is just how he incurred this mistake by relying on an authority where the action was tried by verdict, and that verdict cures the defect in true 1 Sid 39, Bac. Ab. Esp Dig 407, 4 Bac 2453.

In it is doubted whether verdict cures it, but it is very clear that if the jury find damages the Court are to intend that a value was proved to the jury.

7. The Plaintiff must allege a certain year or day on which the trespass was committed, yet he is not bound to the day or year, which he lays for he may lay another day and prove another.

he may go back in his proof before the Stat of limitations
If the deft does not plead the Stat. for unless he pleads the
Stat he admits it the Stat cannot be given in evidence
under the gen issue for it is inconsistent with it, for
the Gen. Issue denies & the Stat confesses and avoids it.
Bac 17, Exp Dig 407, 321. 319. 415 Hob 104.
As to the term laid in the declaration it is but matter
of form, and is all only on special demurrer.

8. The pending of another action vs the same person for the
same thing is a good plea in abatement 5 Co 61, Carte
46. 7 Bac 18.

9. But the pending of a prior action vs B. for the same Trespass is no defence to a subsequent one vs C. for the same Trespass. for the Plff may elect either to proceed jointly & severally with joint Trespassers, But a Recovery in one action is a bar to a recovery in another for the same Trespass. save for costs. Hob. 138, Stra 420. 5 Bac 192.

10. That a Judgt will be a bar vide Cro J 75. Stra 1078. Ec. 7 Dig 593.
The Court of Errors in Conn. have decided that a former
judgt is no bar, It is not Law.

11. That the Plff may join & sue severally in joint Trespass
vide Stra 420 5 Bac 192. B.

12 In some of the ancient Books it is said, that if in an Ac
vs a sole deft it appears that another person was joined with the
Defendant was jointly guilty with the deft the Plff
cannot recover and that the declaration is ill for not
joining the other, 1 Leo. 41 or 211, Hob. 199. 5 Bac 192, 8. 192 B.
This is a singular rule and it is surprising to me that
there is no case where it is mentioned upon either
by counsel or Court. But I cannot conceive it to be Law
Yet I take it to be a fundamental Rule that the Plff has his

action
election to make the joint a several, and it is an estab-
lished rule that if an accomplice appears in evidence
only, it is no bar, neither will it cause a nonsuit or pre-
vent a verdict, and how can its appearing in the dec-
laration make any difference. But further if in this
action two are prosecuted, the Plff may on motion
to the Ct strike out of the depts. and implead him as
an evidence

13. If judgt is received as two or more Defts one of whom
is compelled to pay the whole, he has no legal claim
against the others to reimburse any part, for the law
will never raise a promise of indemnity from any illegal trans-
action

Defence to the action.

1. Whenever a defence to this action con-
sists in a justification it must be specially pleaded
for it is inconsistent with the gen issue. 6 Co 282, Cro 6 Eliz 411.

2. If in an action vs two defendants one suffers a default
nonsuit or is on his several plea found guilty, and
the other pleads any defence which shews there is no
right of action vs either, final Judgt cannot go vs
the first for it appears there the Plff had no right
of action Hob 54. Ld Ray 1372. Cro Eliz 421.

3 The Common Law required the declaration to contain the words,
vi et armis. i.e "force and arms" and the omission was fatal
the reason was that the Judgt of Capiatur was a peculiar Judgt
8 Co 39. 2 Salk 636 Cro Jac 443. 526. 536, Cro Eliz 408, But
by Stat 5 & 6 Wm & Mary the Judgt of Capiatur was ab-
olished Salk 636, 5 Bac 141, Contra Ld Ray 985,

4. The Com Law, required the words "Contra Pacem" the
words were inserted for the sole benefit of "force and arms

with out contra pacem. a a Record of peace Esp Dig 408. Salk 636. Cath 66. Ro Jac 426. 443. But by stat the omission of either is giv'd after verdict, not that the &c. is good without them but that it may be amended Salk 640. Esp Dig 408,

5. In this State both of these sentences have been regarded as matter of form. for there is no difference between injur. for wrongs. with a without force so that here the Action is ill only on demurrer.

End of Trespass. vi et armis

Trespass on the case

Trespass on the Case, arising Ex delicto

The cases for which this action lies arise from tort and not from contract.

1st It lies for all wrongful acts not committed with force

2d For culpable neglect or omission.

3d For consequential injuries & damages by acts which are forcible. These three divisions comprehend all the cases in which this action can be maintained

1st of these cases are Slander, cases of deceit and fraud generally, Malicious Prosecution, Voluntary Escapes, False return to writs, conversion of Bonds, & for goods found, & malpractice in a physician, indeed there is a variety of torts with out force,

2d Those under the 2d class are all cases of neglect of duty in the bailee of goods, by which the bailor is damaged. Neglect of Servant, whereby a master suffers, Neglect of an Officer of Law to the injury of an individual as a negligent escape in a Sheriff or his servants, Neglect of an Attorney to the damage of his client

3d All cases where the grievance consists in consequential damages from a forcible act fall under the 3d head or division, The damages in these cases are laid under a "per quod" hence it is sometimes called a "per quod" action, As if A erects a nuisance in the highway and B in travelling the road is injured by it, here though B's consequential damages arise on the case But if A in throwing this log into the road hit B, who was travelling, the proper remedy would have been Trespass, vi et armis.

Trespass on the case.

for the injury was direct and forcible and not by consequence. Yet in the former case the force of the weapon or command by A. had terminated on B. fell over C. & if over servant, visitor and the master suffers a loss of service the latter has this remedy for this is a consequential injury. and he may bring it with a per quod. But the former for trespass vi et armis for the instant and the direct injury of the forcible act. Bal et al. 74. 3 Blk. 122-3. 110-6 D. mod 180. 2 Blk R 895. 2 Y. R. 167. Stew 636. La Ray 1399. 1402.

In Eng. in the above instance of a beating of a servant, Trespass vi et armis lies by the Master but it clearly on every principle.

4. Actions on the case are generally founded on the Equity of the Stat. of Westm. 2d 13 Ed. 1st.

The only actions at Common Law sounding in tort were Trespass Replevin & deceit. which were formed actions. Then were but three actions on the case mentioned by Reeve. But they were to observe and to bring to mind that the above distinction should be called the parent of actions on the case. 3 Reeves Hist of Eng. Law 89, 243. 3 Blk 31-2. 2 Lev 20. 2 T.R. 129.

5. With us in the form of declaring and of common pleas a distinction is made between an action on the case Trespass on the case, when the action is founded on contract it is denominated an action on the case, but if it sound in tort. Trespass on the case. But this distinction is not known in Eng and is without foundation, every action on the case is Trespass on the case 3 Reeves Hist. Eng. 245. 3 Y. 31 Blk. 208.

6. The difference between Trespass and case is Evidence and Law is that when the action should have been trespass & a mistake. The mistake is evident and inevitable. (The words Trespass an

and alone means Trespass vi et armis. This arises from the distinction between the judgt in the two actions that of Trespass being a capiatur, that if due a mandatum, and it is necessary for the administration of justice that the boundaries of actions should be kept, and when there is no distinction between remedies, there can be no permanent and regular administration of justice 6 T.R. 125, Co Ca 140 1 Wms for further remarks of this distinction vide 5 Bac 191, 3 Vt Trespass 4 to 11, 2 Mod 131, 2 Bac 506.

In many cases it has been a most difficult to ascertain whether Trespass or case was the proper remedy. This difficulty commonly arises in any case of the first division for where there is force in the mistake case is the proper remedy. But under the third class when the injury is possible Trespass is sometimes the remedy and sometimes case, and whether in a given case it shall be the one or the other has occasioned the most difficulty of which I have spoken, and to remove this difficulty the only point to be settled is whether the injury is immediate or consequential. if the former Trespass if the latter, Case, is the proper remedy.

and the example given in page 246. in 1 Chit. Pract. 3 Blk 208. 209. 6 T.R. 123. 125. 153-4, 5 & 648. 2 Blk R. 892, 1055. 2 Mod 313. 2 Lutw 176. Ld Raym 1032, 1117, Salk 380. 3 Bac 567.

If A beats the servant of B. so that he is incapable of rendering service, B suffers consequential damages resulting from the act. The form being upon the Servant also the Master is entitled to Trespass. This is the rule in Comm. A different practice obtains in Eng. in the above case in Eng. the Master may maintain Trespass. but this practice has grown up thro inattention to the law. and has become a precedent which precedent alone supports the practice in that Country. 2 T.R. 176. Ld Raym 1032. 1117, Salk 380. 3 Bac. 567.

8. Since then there in Eng. a late attempt to explode this practice but without effect. 2 T.R. 176. 567.

9. But to give Trespass it is not necessary that the immediate damage occurred by the force employed. To Repeat. vi.

But to give Trespass, It is not necessary that the immediate damage occured by the original force employed. Should the instantaneous effect of such force be such that immediate. 2 Blk R. 899. 900.

10. When the injury is not the instantaneous effect of the force employed it is at times deemed immediate and at others consequential. as regards them in 2 Rules. vi.

Hints When the immediate & proximate cause of the injury complained of is but a continuance of the original force and the injury is immediate the action is Trespass. So he who commits the original forcible act. is the cutter of the mischief from producing the injury and the ultimate force is regarded in law as the immediate or proximate cause of the injury — — — — — — — —

Trespass on the case

2dly When the original force ceases before the injury commences the injury is consequential and the wrong done then liable at all is liable in Case. for the proximate cause of the injury is not the act of him and is not regarded as the immediate effect of his original force. this principle will hold when the injury is produced by the voluntary intervening act of a third person. rational agent.

To illustrate the first rule. A discharges a ball from a gun. which glances an indefinite number of times and hits B. B sustains Trespass. for the injury was the immediate effect of A's act. for the ultimate motion of the ball which was the proximate cause of the injury was only a continuation of the original act and force commenced by A. who was therefore the cause of the whole violence.

Under the 2d rule. An instrument of mischief is put in motion by A. and its direction is voluntarily managed by B. so that it produces an injury the injury is not regarded as the act of B. the proximate cause. nor B. liable in Trespass. But had the position been changed by a pupil and not a moral rational agent. A would have been liable in Trespass. 2 T R 197-8. 3 Bls 18. Salk 206. Ld Ray 274. 2 Blk. R. 892. 5 T R. 648. Stra 636.

11. If A erects a spout upon his house. and this spout throws water or rain upon his neighbours land. Trespass on the case is the proper action. Stra 636. Esp 598. But if A had cut down a drain so that the waters had run upon the land of B. B ac. would Trespass. Ray 467. 3 Lev 523. a 525. 1 Mod 24. 2 Blk R. 892. Vide the celebrated case of Sheppard & Sc M. a Scott vs Sheppard 2 Blk R. 892. ~~. called the Squib case.

12. In the case of the wild and immense Fires made by the Americans among a multitude of his Majesty's Subjects. 1 Vern. 295. 2 Lev 172. in this case the defendt was held liable in case only.

13. There is a case in 2. A.K. 119 which is against the rules, and the only way to reconcile it is to consider it to have depended on the particular declaration, for it and just charge the defendt for having with force and arms committed the injury but declared that the Defts negligently drove and his cart ran against the Plffs carriage & Y.B. 188.

if the defendt had been charged with negligent driving only, case would not have been sustained. 8 Y.B. 188.

14. If A. discharges a gun and the wadding light upon the horse of B. and burns it A is liable in case, for the force had ceased, the fire was in ejection the wad, which existed on the barrel, and then commenced the first Cause. 8. 18.

15. If I dig a ditch on my land & thereby divert a water course from my neighbour B. below me. I am liable in Case and not in Trespass. for the injury is consequential. 2 Mod 174. Esp Dig 638. Stra 5. 638-9.

16. If a servant in negligently driving his masters cart against the horse of another carriage and injure it he is liable in Trespass only 3 Camp. 464. But the action in this Case vs the Master must be case, and his liability is founded in his neglect in keeping such a servant. 5 Y.B. 649. 2 Hen Blk. 442. 1 East 106. 6 Y.B. 125. 7 ib 279. 4 Bur 2093. 1 Boo & Pul 472. Salk. 441. Stra 1083. The case in Hen. Blk. presents the true distinction when the Master was liable in case for his servants negligence. 2 A.K 446. This is a case of the like complexion as to damages in 8 Y.B. 188. which is in my opinion misreported, as it is against all principles.

17. A master is never liable for his servants in any case in Trespass.

22. In this negleon. misfeasances. for want of skill &c. the Master is liable in Case. & in Tort. The Master whenever his servt is liable for him in Case only. 5 T.R. 649. 6 ib 125. 2 Hen. Blk. 442. the case in 5 Term R. is collectly decided but the reasoning is bad. 1 Bos & Pul. 472. 2 N.R. 446. Stra 1088. 4 T.R. 277.

1. When case lies for some consequential damages occasioned by a forcible act the injury may be laid in the dec. to have been done with force and arms. This is by way of inducement. 3 Reeves Eli. Eng Law. 244.

2. Whether the original act occasioning the injury only, or not Lawful is not the criterion of the kind of action for a Lawful act if it occasions an injury will support this action

23. This action on the case lies in a great variety of instances and cases of non & misfeasances as the actions of Naam Jones. mal prosecution an action of trespass on the case.

24. This action lies for the right of a duty which the law requires of one. if it is to the injury of another. Ld Ray 917. 1 Bos & Pul 257. Cro E 219. Eds Dig 599.

25. A Bailee of goods is bound to keep them with ordinary care and if he does not he is liable in this action for he was not bound to take them but if he does he is not bound to insure and above them but to take ordinary care of them.

26. So also for the neglect of an official duty to the injury of another. Eds Dig 603. 1 Rol 93.

27. There are other cases in which the agent may be liable also, in this action in negligently omitting to insure. Ex. 1st. When he has goods of his principals abroad and is directed to obtain insurance If he neglects to do it

Trespass on the case.

he will be liable if a loss happens the same as the insurer insurer would have been had he insured.

2d When an, whether an agent or not in the proper sense of the term, has been in the practice of insuring for another who is abroad. If he discontinues such practice without giving (practice) notice he will be liable in Case for the injury sustained.

3d When an accepts bills of lading sent to him on the condition of insuring property. he is bound to insure them tho he wishes not to do it He must take care how he binds himself to do acts for others. This is a frequent practice Marsh 205–6. 2 Str. 1188. 7 Vin 157. Park. 303.

28. This action lies against a voluntary agent tho he receives no reward provided he enters upon his undertaking and guilty of mistakes neglects &c. as if to carry goods to a certain place. he is not bound by the agent But if he takes the goods on board, he must account for any injury done affecting them, so if one voluntarily agrees to build a house gratuitously for B. and commences the work if it is not done skilfully and properly he will be liable to the employer in this action 1 Esp 34. Marsh 206 207–9. 2 Ld Ray 908. This is because the delivery of the goods is of itself a sufficient consideration.

29. When a Mechanic does his work unskilfully or negligently he is liable in this action

When employment is committed to one not of his occupation he is not liable for unskilfulness tho he is bound to be faithful as if cloth was delivered to a Blacksmith Sold to a Tailor &c. Ld Ray 214 2 Wils 259. Cro Jac 601.

30. So also a Surgeon a Physician if thro. their neglect a gross ignorance in their profession commit injury.

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Ld Ray. 213. 2 Mod 259. 8 East 348.

But it is said if I do not make physic a negligence a profession of skilling. Should the guilty of neglect a want of skill &c & should injure a patient. He would not be liable Bro Dig 601. Ep cites 3 Blk. 122. 166 Ld Ray 214. But they do not support him this case cannot be law.

31. This Action lies gen is favour of him who has suffered in health by the ignorance & unskilfulness of his physician or surgeon. On this principle as lies as a Landlord who sells bad wines food &c to his guests.

32. This Ac. lies as on who shuts a nuisance to injury of another habitt or those of his family. Bro Dig 601. 1 Rol 90-5. & 905. 3 Blk 122. 4 Co 52 Hent 135. 3 Buc 182.

33. I remark that the Law always implies a warranty by the vendor of provisions & articles of human consumption. That they are good and sound. This restriction of warranty arises from a high regard of the Law to the health and life of man. But in the sale of any thing else the Law implies no warranty.

34. Another Class of injuries for which this action lies, are for the injuries done by animals. and is when an injury is done by an animal common to the species the owner is liable without notice. But if it is an injury for which they are not addicted before, notice is necessary as for that done by dogs. Thus, by our State Law the owner is liable for any injury committed by his dog. Vide Stat Court. Rep. 1821. 179-80.

And tho the mischief of which the owner has notice as to the species of it is different he is still liable, as if he has had notice that his dog has bit a sheep and afterwards he bites an ox he is liable on this scientia 1 Ld Ray 209. 2 Salk. 662. 3 Ab 12.

The Defence is not a subject of a special traverse. The proper

made to deny it — it is under the gen. Iss. 4 Co 18. b 2 Roll 4. — Ja injuries to animals the liberty of the owner without notice Co Car 254. 2 Ld Ray 806.

35. This action lies for what is called a disturbance by this is meant in Law the unlawful hindrance of one in the free enjoyment of his right. Gen. of an incorporeal right. A Stranger is always liable in this action. but a grantor may be on his covenants. as of a right of way. hence the Grantee has no corporeal esp. Trethaf is not the case, 3 Bl R. 236. 241. 9 Co 112, Co E. 845. Stra 5. 638. 2 Lee. 266.

36. Another class of cases are escapes either on mesne or final process. This whether the escape is voluntary or negligent 1 Show. 176. 2 Stra 873. Co E. 17. 2 Blk R. 1048 Esp Dig 609. 2 Term R 126. On this subject see Gt. Sheriffs & Gaolers. Lee. 359.

37. This ac lies as a Sheriff for refusing bail. which by law Bail should be allowed in gen. one attached upon mesne process is liable to bail, Always in civil and in most cases in Criminal Proceß. 2 Mo 313. 8 Co 146. 2 Co Ent 141 a 196. 1 Leon 189.

38. It lies also for a rescue. or any who rescues one on mesne process in favour of the original Plaintiff Bul N.P. 62. 6 Mod 211. Hob. 180. 8. T. R. 127. Esp Dig 610. 657.

And in this case the jury may give against the rescuer the whole demand against the rescued a special warrant for a peculiar sum, there is no rule of damages prescribed by Law. but it is well for the Pltf to show the rescued to be insolvent a that he is out of the reach of process as this will tend to induce the jury to give the whole sum his damages Bul N.P. 62. Esp. Dig 657.

39. This action lies for a rescous as from hence it appears that the Plff & the Sheriff may have the action. vs the rescuer. Cro Car 77. a 109. Hut 98. Esp. Dig 610.

9. It lies vs the Sheriff & other Officer for a false return made upon a writ. As if a Capias is delivered to a Sheriff and he returns. "non est inventus" when he might have found the defr. as if he makes a return of an Attachr when he has made none. in such case the Defr in the writ may have this action. 1 Mod 336. Hut 650. Cro Ca: 71-9 & 719. Esp Dig 615.

11. It lies also vs an Officer for not executing legal process when it was his duty to execute it. as if he receive process which it is his duty to execute. and refuses to do it. 2 Mod 23-4. La Ray 331.

2. There are several cases in which an Attorney is liable in this action. As if he neglects his clients business or is guilty of any misconduct. whereby his client is injured. 2 Mod 325. 4 Bur 2060. Salk 86. Esp Dig 617.

An attorney who betrays the cause of his principal i.e. client (he being retained) neglect to appear at trial by which the cause is lost, is liable in this action for a reparation to the injured client

13 Mod 165 Stuart. Hutton. 125. 3 Mod 377. 3 Bac Ab. 165. 1 Mod 209.

43. There are cases in which any indictment presentment found upon any court of justice to the damage of another, may be pursued in this action As if A sues B. and C. abets, procures B. and confesses judgt he is liable in this action

1 Roll 100.

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44. It lies vs a magistrate for some neglect of duty as if one denies bail to another legally entitled to it. he is liable in this action. If he refuses to take an intimation required by Law to be signed, sum of deposition &c as for refusing to issue process when required by Law Esp Dig 618. 1 Lev 2 Lev. 2 Lev 223 1 Hawk 90.

45. But if one having commenced a suit compromises it he is not liable for not countermanding the writ nor if the action maliciously & to countermand is not his duty 1 Cond. 2 Wil, 302. Salk 32. Doug 134. Esp Dig 648. 1 Bos & P. 388 But since the Stat of Ann making the return to be traversed, I trust this action will not lie since there is no privity and I think it would be as much as it would be for a Mf to sustain an action on the case vs the Deft for a false return.

46. This action lies for any breach of trust of a bailee any kind of the property bailed is lost by the bailees neglect 2 Ld Raym 909. Esp Dig 618. 4 Co 83. Salkild 26. Com. Dig 133

In such case the bailor has his election of remedies tho when the injury is from neglect he may have this action for the injury, founding his title or have Assumpsit on the contract of bailment express & implied 3 East 62. This action lies against the owner & master of a vessel for the loss & injury of goods shipped on board occasioned by neglect. Peake 440. Esp Dig 623.

47. When the action is in the disjunctive, this is this writ action. If the action sound in tort it may be laid

47 one of the owners alone But if the action is brot on the contract of bailment standing in contract the whole must be sued. If he recs in tort he may sue one alone or any number up, to s thus the whole 2 Salk 440 3 Lev 203. 5 T.R. 651, 8 East 62. 70.

The rule down in Salk is general but is qualified in 5 T.R. & 8 East.

48. For a false return to a mandamus, this action lies as an Officer of a Corporation as the case may be against. This at common L was the usual remedy for such returns 1 Ven. 111. Salk. 32. Doug 134. Esp Dig 648.

49. For any fault a neglect of duty to the injury of another this ac. lies. as for the loss of a letter committed to the mail if occasioned by the misconduct of the authorized person. a for the neglect of any of his subordinate Officers. Cowp 765. 3 Wils 443, and this is the only for when in contract either express a implied.

50. But a Postmaster is not liable like a common carrier for Bills, Notes &c. lost by his subordinate Officers for he is an Officer of the government. Nor can he be called a common carrier, more than the secretary of the Treasury a bailee. Salk 17. Esp Dig 624. Cowp. 754.

51. In such an action for all loss of personalty belonging to his guests for he is in the nature of a carrier. If thro the house servants a baggage waiter

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remaining at the com. is lost. he is liable in this action
Bul N.P. 73. 8 Co 32. Esp Dig 626. 3 Blk. 165-6.

Vide Lectures. Gt. Innkeeper. &c

52. Partial insanity or a non sane mind will not excuse Innkeeper for if otherwise the door of imposition would be opened by feigned insanity Cro E 622. Esp Dig 628.

Of Fraud and Deceit in the sale of goods.

(But) one comprehensive class of cases in which this action lies is Deceit and fraud in sales, especially in the sales of (Personal) personal property.

1st This action will lie for a false warranty or affirmation on the part of the vendor, to the injury of the vendee in the sale of goods, as if he warrants them sound or of such a value when they are not. Even an express warranty will not support this action unless it be made at the time of the sale. Salk 211. Esp Dig 629. Cro Jac 4. Yelv 20.

2. In the sale of real property at common Law a false affirmation of the property will not sustain this action for the vendee must take care that he secures himself by covenants

But whether an action ought not to lie in this country is a different question from what it would be in Eng.?

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The Eng. Law seems to be settled that no action will lie for false representations of the value quantity &c. of the property.

It has been the uniform practice in this State to sustain this action, and false representations are sufficient. But the Ct. of Errors have of late admitted the Eng. rule. 1 Johns. 356. a 560. Com. Dig. Tit. Co Litt 384. 2 Day. 128. Salk 211.

My opinion is that it would be proper in this county to allow this action considering the great quantity of land that have no certain bounds and though open a door to fraud. Even in Eng. their land boundaries have been settled by certain

When there is an express warranty in the sale of goods. accompanied with any collateral stipulations that might vary a quality the same, and that warranty is false. the Vendor has an instant returning the goods & giving notice to the vendee. that an action could be maintained on the warranty in this. But the gist of this rule is that no previous steps is necessary to the bringing of the action and also that he may keep the goods.

— " 1 Hen Blk 17. "
— " 2 T R 745. "
— " Esp Dig 13. "
— N.Y. Ed. 39. —

Trespass on the case

4. But if the warranty is complex with an agreement that the vendee shall return the property if it prove unsound, the vendee must return the goods a tender in such is the contract of the parties and the intention governs. 2 T. R. 745. 1 Camp 194. n. 2 Hen Blk. 573.

And if under such a warranty and agreement the vendee retains the property & remains the contract he may maintain Ind. Assumpsit & a special ac on the warranty at his election, for after the property has been the property as if it never existed and the money thus and received, so that when this action is first it is in affirmance of the contract, but when an action is brot on the warranty it is in affirmance of the contract.

If in the case supposed the vendee chooses not to rescind the contract, by returning the goods he cannot sustain and Ind. Assumpsit, tho he may his action on the warranty, for unless he has returned the property the contract is still open, & still remains.

Indeed Ind. Assumpsit cannot be maintained upon the ground that the contract is rescinded 1 T. R. 133. 136. Camp 318. Doug 23. 1 T. R 181. 5 East 449. 7 East 294 Com Con 138

Of False Warranty & Affirmations

When such a contract is put thus rescinded by eviction the pr-
-ety. ind. Assumpsit does not lie because the express contract
does not exist. 7 East 274. Comp. 818. Doug 24. 3 Esp Rs. 42. 1 Selw
N.P. 112. 691-2. 4 Mass. 135.

5. But if goods which are merely warranted sound without
any agreement to return them, yet they may be returned
and sue upon the warranty in case if the goods prove
unsound. This is the rule where there is a mere warran-
-ty. 3 Esp. 83. 1 Selw. 688. n. 9.
The principle of this rule is. if a warranty is made and the
warranty is broken certainly an action will lie. If a party
enters into a contract when the warranty is false. the contract
is void ab initio.

6 But an action lies not only for a false warranty but also
for a false affirmation respecting goods. if false and
fraudulent affirmations & contracts entitles the vendee
or the vendor. If the vendee by the use of ordinary care
or diligence, might have known the existence of the
defect he cannot recover. Ld Ray 1118. 1 Comb. 110.
1 Salk. 24. Esp Dig 629. 630.

. Thus where the vendor declared to the vendee J. S. would give
£100 for the property here tho. the assertion be false, yet no
action can be maintained. The same rule as to vis-
-ible effects under a general warranty & sound &c.
holds. in fact.

7. When there is a general warranty & contract tho. false if
visible to the person, no action can be maintained. But if
the vendee has not the knowledge of such defect. for want of
his own skill an action may be maintained
But I conceive a special Warranty will hold even in
known defects.

Trespass on the case.

3 Blk 165. Esp Dig 178. n. Case of gen. Warran 5 Salk. 211.

9. If the purchaser of goods under a warrants of goods sells them to another, this does not oust him of his action against the Vendor to him. 2 T.R. 748. 1 H. Blk. 17.

10. In N.Y. The Practice of vouching in a warrantor of title obtains as at C. Law in case of freehold estates. If A warrants goods to B. and C brings an action for the goods in Trover. now B. only cannot in ie. cite A. to appear and defend the title as the judgt against B. will hold against A. 1 Johns R. 517. this rule would

11. This action lies against a vendor for artfully concealing known defects. This is as plain a fraud as false affirmations, and the law gives it the same effect. Esp Dig 632. Peakes Ev. 229. Peakes Cases. 105.

12. Indeed when the Vendor conceals the defect the vendee may either sue for the fraud or upon the implied warranty of soundness so that he has 2 Remedies. tho the result in both actions is the same. 2 Roll R. 5, Esp Dig 629-632.

13. It was formerly determined in this State that if the Vendor without fraud sells the property for the true price the law implies a warranty on his part. this action has been held in this State in a hundred instances, but it is directly contrary to the rule of the Com. Law. the maxim of the Com. Law is "Caveat Emptor" but that in this State seems to be "Caveat Vendor" the rules are taken from Mr. Powell, under an incorrect idea. 2 Roll 407. 2 Swift 120. 160. 1 Powel Con. 150. opposed to all rules of C. Law. 3 TR 57. Peakes R 115. 123. 2 East 314. 322. 2 Johns 176. 1 ib 274. 1 Pow. on Con. 142.

14 Ex. 4. To this gen. Rule, there is an Exception at C Law in the sale

Of false Warranties & Affirmations.

If the single article of provision 3 Blk 156. 1 Term. 110.

15. But when any property is sold by bill of Sale. there can be no implied warranty of Soundness. because the law will will imply nothing in the bill of Sale contrary to its stipulations the Remedy in such a case is an action for the fraud. 1 Johns. R. 503 Esp Dig N.Y. 248.

16. A Parol warranty in a Bill of Sale is utterly void. 1 John. R 414 Esp Dig N.Y. 248.

17. Where the vendor falsly affirms with respect to his title this action will lie. but in an action it is indispensible, to the support of the action that the vendor knew of such defect in his affirmation. But when an action is founded on the warranty as a warranty of soundness or a warranty of title it is not necessary that the Vendor should have known the falsity of such warranty. for the action is on the Breach of Contract, tho. It is laid down in the Books frequently indiscriminately that Scienter is necessary. Cart 90. 3 Y R 57. 1 Term. 109. 373. Esp Dig 629. 632. Bul N.P. 80. 3 Y R. 57. Doug 632. 2 Carr 448. 1 John R 129.

18. A Sale of personal Chattels however implies a title in the Vendor unless it appears that the vendee intended to assume the risk. Roberts on Fraud Conveyance 523. 1 Term. 373. Com Dig. Action Case deceit. A.8. Cro Jac. 179. 474. 1 Johns 274. the reason why the contract implies a title or a Covenant of seisin is because the words. dedi concessi &c. imply a title in the Vendor.

19. If the vendee is induced to waive the warranty by the false declarations of the vendor. or even if he assumes the risk, yet an action may be maintained by the vendee. for the declaration is false and fraudulent. there are many instances of horse jockies playing tricks (6 Johns 110) by saying they will not warrant but swear it is valuable and sound.

Trespass on the case.

20. This action lies for the false affirmation tho. the person making such affirmation has no interest in such ground. This is decided in the great case of Pasley v. Freeman. 3 T. R. 51. 1 East 318. 2 ib 92. 12 ib 632. 638. Peake N. 226. 3 Johns 271. 6 ib 81. 6 ib 25. 3 Bos. & Pul 367.
It is indispensible that in this case the deft should have known this affirmation to have been false.—

21. This action lies for any kind of cheating as deceitfully made &c. & in any case where fraud is thus practised 1 Sid 258. Bul N.P. 32. Esp Dig 633.

22. It was always understood to be a rule of law. where an action was brot for the price of goods and labour done upon a specific contract. the person for whom the labour was done, has a right to shew any thing which goes to diminish the price of the goods & the labour done & might thus reduce the Plffs claim. Now it is settled thus under an agreement for a particular price. if the goods prove not good & of bad quality. it may be given in evidence upon the claim — 1 Camel 139. 190. 194. n. 1 Esp. R. 13. 7 East 479. 1 Selw. 691. 8 Johns 453. Contra Peakes Ev. 233. 4 Esp. 95.
It has been determined in Eng. & N.Y. that if the Deft. does not make out defence and judgt. goes against him he must bear the cost and cannot afterwards bring a Cross-action 1 Cam. 190. 8 Johns 453.

23. If I by a wrongful act make an innocent person liable over to a third person. I am liable, If A owes B. Cattle on the land of C. & B's cattle are distrained B may recover from A. 1 Ro. Ca. 925. 1 Roll 101. Carth 3. 4. Robs. Ind 5.

In what cases this action will lie.

24. If A having an Execution against B. and directs the Sheriff to take the goods of C. A is liable and not the Sheriff. 1. Pow Con. 177. Hut 53.

25. When a Public right is obstructed or violated to the injury of any individual that particular person may support an action in his individual capacity but he must shew some special damage. thus where the law has established (toll) Ferry. and Mills. toll free. 1 Salk 12. 5 C. 72-3. Carth 193.

26. So when a public nuisance occasions an individual damage, as an obstruction in a navigable river. Carth. 194. Bul N.P. 26.

27. If any one should do damage to a Bridge or highway and an individual suffers thereby, he is entitled to an action. But it has since been determined that if he could have avoided the damage by ordinary care (11 East. 60.) he is not in such case entitled to an action.

28. A very comprehensive class of injury for which this action lies is that of Nuisance. as an obstruction of ancient light 4 Co 58. 3 Blk. 216. 1 Ves 239.
The rule as formerly laid down required that the lights should have been immemorial. Cro C 118. Bac Ab. 170. Salk 459. 6 Mod. 116. Now however it has been settled that long enjoyment of lights tho. not immemorial as 20 Years is sufficient to vest this exclusive right in this State 15 Years Esp Dig 636. 2 Saund 175. b. 1 Bos & Pul 400. 11 East. 372.

29. But the enjoyment & possession of lights for 20 Years against the tenant of the adjoining land is not exclusive as against the Landlord unless he had a knowledge of the same 11 East 372.

Trespass on the case.

There seems to be great complication as regards ancient lights. 2 Com. Dig. 597. and onward. A case respecting ancient lights has not to my knowledge been directly agitated in this country how the law would be considered I am unable to determine. In large commercial cities this law would or might occasion great inconvenience.

30. If a man has built a house on his own land. sells it to another. neither he the vendor nor any one claiming under him shall have a right to build an adjoining building, obstructing those lights. The reason is. that to obstruct those lights would be in derogation of his own right this extends only to the vendor and those holding under him. 1 Lev. 122. Esp Dig 636. 1 Ver 237-9.

31. But a house built on a street is immediately entitled to the privileges of an ancient dwelling on the part fronting the street. and an obstruction of the same is sufficient to support an action by the proprietor of the party first building. 3 Wils 461. 2 Blk R. 924. Esp Dig 636

32. But the obstruction of a mere prospect before ones house is no nuisance and for this no action will lie and indeed there can be no remedy 9 Co. 58. 3 Blk. 217 Esp Dig 636.

33. And in these cases of nuisances there is one peculiarity which is, that one recovery is no bar to a recovery for the same nuisance. and thus he may sue toties quoties 2 Lev 103 Cro E 191. Esp Dig 637.

34 The Author of a nuisance cannot discharge himself from liability by subsequently or assigning the land on which the nuisance stands to another. even he cannot discharge himself from damages accruing after the disposal of it. If a man erects a smelting House and sells it afterwards it occasions an injury the vendor is liable for the injury done after the sale.

Salk 160 Cro E 170.] When this action lies,
The assignee or purchaser is also liable for any damages accruing after the assignment or purchase, so that the party has his remedy against either the vendor or assignee or purchaser
Esp Dig 637. Cro J. 373. 555.
For the obstruction of Lights an action will lie (in favour of) against the Lessee for years & the remainder or reversioner. men
4 Bur 2141. Cro Car 237. & 325. 11 East 372. Esp Dig 635,-7.
This action lies also for overhanging one's house or land so as (as) to cast water upon them. 3 Blk 216. 1 Roll 107. 5 Co. 101. 1 Stra 634.
This action lies also for obstructing one's way over another land and this seems to be a disturbance rather than a nuisance. Trespass cannot be maintained, because he has no interest in the land. as this is more than a right to pass over the way. Cro E 84. 466. Cro J. 170. Esp Dig 639. 640. And that a right may be presumed from long and uninterrupted usage. for as to incorporeal (a) rights it may be presumed from usage. Bul N. P. 74. Stra 909 11 East 372 375. Esp Dig 640. and a right of way may be presumed from long the public by 6 years uninterrupted usage. 11 East 376. n. 1 Car. 266.
This action will also lie for the erecting of a manufactory of any kind of works of which the vapour is injurious to ones heirs & grain Cro E 191. Esp Dig 638. 3 Blk. 217.
A fortiori will it lie for any act by which the air about one's dwelling house is infected. as erecting a pig stye or tanery 9 Co. 59. a. 2 Roll 141. Esp Dig 637.
It lies also for turning an ancient water course from the land of another. every person that whose land an ancient water course runs has a right to the water and no one

above may turn it off. tho he has the privilege to water his cattle &c. and use the water for family purposes.

Adverse Possession.

1 Wils 174. 1 Stra 5, 6 East 208. Esp Dig 638. 641. 2 Com. R. 93. 584.

40. But a right adverse may be acquired in 20 years unin-terrupted & adverse use & enjoyment, in this State 15 Years is limited. The courts have now by presumption brought the subject of incorporeal rights within the Stat of Limi. 6 East 208. 1 Bos & Pul 400. 1 Camp. 463. 10 Johns 241. 4 Day 244. 1 Conn R 382. 2 ib 584. 8 Mass. 136. & 15 Johns 213.

41. There are certain class of injuries I must not time of now. but I refer now to injuries effecting the relations between Husband & wife Parent & Child. Master & Servant &c. Lee. Dig. Act. Ass. N. 2 &c.

42. This action lies for the violation of our election franchise If therefore a legal voter tend to the presiding a particular Officer his vote and it is refused, he may have this action Salk 19. 3 ib 17.

43. And upon a similar principle a candidate may have this action against the Returning Officer for refusing to accept & count the votes given in for him 2 Vent. 25. 1 Ver 206. 3 Keb. 26. 32. 2 Lev 51.
And a Returning Officer in such a case is also liable in this action for a false return. 11 Co 99. Esp Dig. 647.

44. But whether an action will lie, (for a false return) when one is elected to a legislative Office (When the legislature determines the falsity of the return before this is settled by the Legislature, is a question unsettled.

Salk 502. 6 Mod 45. 47.

1 Wils 127 Esp Dig 647. Plagiarism.

45. This action lies for the violation of literary property. The author of a literary work at Com. law has an exclusive right to this work and its publication, therefore he has a right against any one

When this action lies.

for publishing said work without the author's permission —

4 Bur 2303 a case, extending 100 pages. It is there established that the right exists at C Law. Now it is established by Stat. Stat U.S. 7c improvements.

46. On a similar principle it lies for a violation of any Patent Right, which is established by Stat. 14 Years exclusive, is given to make vend &c. Bac Ab 769. 1 Vk 392 Salk 447, Esp Dig 648. But the cognizance of this action by a late Stat is confined to Federal Ct. i.e. Courts of U.S. one respective States have no jurisdiction over this action. The Patent is not exclusive evidence. it is only prima facie evidence and the Deft has a right to shew the invention to be in some other person, or treat, or in himself.

47. The Master or employer of a Servant or agent is generally liable for their acts. It is a gen. rule that a person employing any agent or Servant, is liable for any damage accruing by or from their acts in the course of their employment 2d Raz 739. Salk 440. Stra 1083. Esp Dig 600.

48. For the Obstruction of Legal process this action lies. By the person injured by such obstruction. A sheriff had an Ex vs A. A had evaded the Sheriff. and upon a certain time was at home. which the Sheriff was about to enter the House to take A. B entered before him closed & locked the door. B was held liable —
Cro E 908. 5 Co 93 a.

Pleadings

1. In declaring in Spec. actions on the Case, no precise form is required. There is no such thing as any independent technical allegations necessary as in many other cases, The declaration varys according to the situation of the case Gilb L 193. 5 Vk 591. Arguendo.

Writ of Mandamus

Mandamus

1. This is what is called a prerogative writ issuing from the Ct. of K.B. and it answers in some degree to the Chancery redress afforded by a Bill in Ch.y.
2. Its right is vested in the Ct of King B. 3 Blk 110. Salk 429. 1 Ven 175.
3. In this Country the writ is issued by the highest [illegible] ordinary Jurisdiction. not Supreme Ct. in this State but by the Superior Ct.
4. This writ is granted on occasions relating to Government or the Public, where without it there would be a manifest failure of justice 4 Mod 281. Doug 506.
5. & 6. Its Manifest design is the use of this writ, is to compel due obedience to acts of the Legislature. and to prevent disorders and acts of the police by disorder is not meant tumult or riot but derangement of Justice.
6. This writ issues only in those cases in which this is no other specific remedy. & generally it cannot be issued

Writ of Mandamus.

where there is any other adequate remedy.
Doug 506. Cowp. 377. 1 T R 148.

7. In gen. the object of the writ is to restore the person to any Franchise or Corporate right, or 2ly. to admit such person to those rights which concern the administration of public justice. 11 Co 23. Esp Dig. 661.

8. This writ gen. issues against some public Officer, Body Corporate, or Inferior Ct, commanding a performance of some official or Corporate duty. 4 Mod 52, 3 Bac 528. Vi. Mandamus.

9. This is also a writ demandable of Right, and the Ct of K.B. has no discretion to exercise as regards the expediency of its issuing, as the case in Inferior Courts. 3 Bac 528.

10. The writ may compel the Officers of a Corp.n commanding them to hold a meeting, or commanding to hold an Election 1 Lev 91. Ray 69. Esp Dig 662. Stra 1003. 1157.

11. It lies also to restore a person to every description of Corporate Offices of which he is deprived. as if a Mayor refuse to admit a Clerk chosen. also if it refuses to Admit a Constable &c.
Vin 57. 4 Bac 199. Pop 176. Ray 431.

11. This writ lies in short for the purpose of commanding Officers in Authority to do their duty. Specifically, they refusing to do the same. It lies against an Ecclesiastical Ct, or here our Probate or Surrogate Ct.
Stra 113. 2 Keb. 871. Carth. 457. Stra 552. Salk. 299.

12. It will lie also against a Clerk of a Corporation commanding him to deliver up the Books if he refuses. as in the case in this Book. 2 Stra 879. 1 Wils 305. Esp Dig 663. 667.

Writ of Mandamus.

13. It is not ascertained by any very definite rule what Offices
are of this discription where one can be restored to his privilege,
The Office must be one which concerns the public & the ad-
ministration of Justice. It is well settled that a writ may
issue to compel the restoration of a Mayor of a City or Alder-
man a Councilman or a Town Clerk. a Constable or
a Sexton in Engd. now these are Offices of inferior discription
11 Co 94. 1 Ven 146. 153. Raym 211. Salk 175. Comyn. 371. 377
14. So also it lies to restore one to the Office of Attorney
to the County Ct. in this Country. 1 Keb 549. 1 Ven 11.
But the Office which come within the discription
must be of a certain and permanent nature. Hence
an institution depending upon voluntary subscription
not endowed by Law. comes not within this Rule, as
a Library Office or an Office in Masonry 1 Wils 11.
1 T.R. 331. 4 Ib. 125. Esp Dig. 665.
15. But the quality of permanency does not require that it
should be an Office of freehold. if it is but a year.
entitles to a stipend or salary. it is an Office within the
rule 1 T.R. 146 Esp Dig 666.
16. It lies in this State to compel a County Treasurer
to pay over money to the Creditor of the County.
This writ lies because there is no method by the
treasurer can be compelled by action. -
17. But Justices the writ may lie against the Magistrates
of a County to build a State building. when such is
the Law. in this State. Goals &c are supported by the County
18. when the Office is merely private this writ can never
be granted. 1 Ven 143. 1 Sid 40. Esp Dig. 666.
19. But an Office in a Turnpike Company is corporate. in-
-ed be I should think entitled to this writ -

20. to a Bank Officer. But this is only my opinion ——.

21. This writ never goes to enforce an act when it is uncertain whether the person a party complained of has a right to do it or not. 1 Mls 256. Esp Dig 665.

22. Nor does it ever issue when the party complaining has any other specific remedy. the higher Ct. are never called into exercise of its jurisdiction when redress may be had in other inferior Cts. Doug. 506. Esp Dig 666.

23. It is never is granted to compel a Court or Magistrate to do any act of which the doing is discretionary. now there are many acts of discretion as a notice of postponement; to enlarge the time of trial. &c. &c. 2 Blk 708. 2 Stra 881. Esp Dig 668.
It is said the granting of a new trial is discretionary It does not mean that the positive act of granting a new trial is discretionary But it is the right to Refuse granting a new trial.

24. If several persons are deprived of their offices. each must make their several application for a Writ of Mandamus they cannot be joined. because their causes of complaint may be different. &c Salk 433. Bac Ab. 200. Esp Dig 668. 669.

Manner & Consequences of granting the Writ

1. The writ strictly is not granted in the first instance i.e. on an application made and granted. The rule is usually for the Ct. to grant a Rule to shew cause why the peremptory writ should not issue. The first step then is to make a Motion. with an Affidavit. The motion of a motion without oath is not good. There must be an affidavit. Bac Ab 199. 200. 3 Blk Com. 264.

Writ of Mandamus.

111. Esp Dig 669.

2. When a two classes of cases in which this writ issues in the 1st instance. 1st. Where the circumstances are urgent and require no delay. 2d. When a motion is made to compel a magistrate to sign a Poor Rate. Esp Dig 669.

2d. What are called in General Cases. by gen. Cases are meant cases of notoriety, where the grounds of applying is notorious and manifest, 3 Bl 110 But it never can issue to compel a Ct. Officer or Corporation. &c. to prevent a delay or omission of duty, it lies to enforce what has been omitted.

Bul NP 199. Esp Dig 670.

3. The writ is never delivered to a Sheriff or other Officer of Law to serve on the party. The writ is directed to the person of body politic. corporation &c. When the writ is delivered the party must do the act or make a return assigning the cause of not doing it Salk 433-6. Esp Dig 672 But what if he returns the writ and does not return it in such case there is a peremptory order and the if he neglects he is guilty of contempt. and an attachment issues, this does not touch his body but compels a return.

If the offence is by one member of the corporation, the cannot issue vs him alone. but must issue vs the whole corporation Esp Dig 673. Stra 55. Salk 699. 701.

When the writ is issued if the D[illegible].

If on the application for the writ and the rule to shew cause the party does not shew cause. the writ issues. but the writ is not peremptory. but issues the alternative. either to give reason or do the act. 3 Bl 110 111.

Writ of Mandamus.

6. at Com. Law. the party praying out the writ could never traverse the return. because the return was considered as correct an one more in than the traverse. In that case however an Action of Trespass on the case and thereby recover damages & costs. yet this was a very circuitous rout to reinstatement. 1 Vent 111 Salk 132. Doug 134 Esp Dig 648.

This appears an unreasonable Rule at first. The principle is that a return of an Officer can never be falsified unless by a certain remedy commenced for that purpose by giving 15 Days notice & this is now altered by Stat 9 Geo. by which the Plff may traverse the return and thereby falsify it 2 Ld Ray 481. Esp Dig 648. 3 Bac 543.

We have in this State no such Rule. but one Ct. have adopted the Com Law Rule.

7. If the Complainant prevails in any of his returns or by any pleading at all he recovers damages & costs. on that writ. and is barred from any other action. Stat 9 Geo Ch. 20. Sec. 2 & 3. Bac. Abr. Vt. Mand. Stat Vol. 12. 109.

8 If the Complainant prevails in setting aside the return and it is tried by Jury he is then entitled to a Peremptory mandamus. as well as Damages & costs. 3 Blk 111 Esp Dig 648.

9. And at. C. Law if the return of the writ is insufficient on the face of it. the Complainant is entitled of course to a peremptory mandamus, Bul N. P. 685. Esp Dig 685. 3. Blk 111.-

10. At Com Law. if the return was false by many making the return. i.e. the defts makes a false return. the action in this case might be tried as all jointly. for the act is a tortious one. & a "joint ac." is good Carth 171. Esp Dig. 685. 3 Bac. 544.

Writ of Mandamus.

11. When the def.t maliciously suppresses any material fact the action will lie, for "suggestio veri" and "suggestio falsi" have the same effect Doug 144.

12. When a corporation rets a false return and one, or more not sufficient to make a majority is appointed if the falsity of the return they are not liable but the writ issues as all the corporation but only those who are in favour of the false return Cald 172 La Ray. 564. Ep. Dig 685.

13. If the return in the case is set in the same Court from whence the mandamus issued and judg.t for damages + costs are issued in the case. a Peremptory mandamus is immediately issued.

14. If the writ of mandamus is issued from one Court + the action in the case is set in another Court and judg.t obtained for damages. there must be an application for a trial upon the Ct. from whence the mandamus issued and the record in the Ct is examined in the first case to what the peremptory mandamus immediately issues in production of the record Salk 428. Ep. Dig 686

15. If the party complained of has the writ delivered to him and does not make return to the writ he is liable to an attachment 3 Bac Ab. 485.

16. If the writ of Mandamus issues to several defendants the writ of attach.t of course goes to all of them but if to this attach.t the def.t can show that he is unable to make a return but was ready he is not liable for any fees who are guilty are liable

17. The punishment is Fine, Imprisonment and Sometimes both fine & imprisonment Hen. 808. 4 Bac. 28. Co Car. 146

18. If the party is guilty of any known falsity or concealment the Ct will consider the act as a contempt of Ct

End of Mandamus.

Writ of Prohibition

1st. This is also a prerogative writ issuing from the King's Bench for the purpose of preventing inferior Courts either from declining matters out of their jurisdiction - a power devolving from any precedent established by that Court. Bac. Abr. Tit Prohibition

2. The this writ is generally confined to the King's Bench yet it may also issue out of Chy. Common Pleas or the Exchequer. Yelv. 15. 1 Co. Blk. 476.

3. This writ is not directed to the Sheriff but to the Inferior Court. and the person prosecuting in it, and it must always be founded on the suggestion. That the cause of complaint or that the Court is devolving from some statute &c, or that the Court is proceeding from some Statute Regulation. 3 Blk. 112.

4. The course pursued to obtain this writ is in its nature of the same kind with that pursued in the writ of mandamus" except that this is founded on a suggestion, the other on a motion.

5. The first proceeding is to obtain a rule to show cause why the inferior Ct. or party prosecuting in it exceeds their jurisdiction, or deviate from the Statute Regulations. This suggestion must be verified by affidavit

Writ of Prohibition

6. The suggestion is accompanied with the proceedings in the supreme Ct which is the cause of the suggestion 1 Salk. 459. 1 P Wms 476. Hob. 79. 4 Mod. 293. 2 Ld Raym. 1211.

7. It has been a debated point, whether a writ of prohibition is a matter of strict right or discretionary, in the opinions of many courts. yet it appears to be discretionary. Stat. 6th. Ric. 2. c. 4. Salk. 33. 2 Ld Raym. 1220. 575 586. 1 Sid 65.

8. If the matter suggested in support of the rule is sufficient, the rule absolute will command the party not to proceed, i.e, not to hold plea of the cause but if the matter is insufficient no writ issues of course 3 Bl Rep. 1132.

9. If it is doubtful if proceeds a cause duly & fully the party complaining is directed to declare in prohibition Now the declaration is a mere fiction, in this case the Ct directs the party to recite that the writ has issued & that the party below has disobeyed by their proceeding in the cause Cro E. 736. 3 Bl Rep. 1132. 1 Leo. 125. 4 Mod 152.

The party availing in the prohibition is directed to declare in prohibition. i.e, by filing a declaration against the other upon a suggestion, (which is not traversable) that the party prosecuting has proceeded notwithstanding the prohibition. Then upon demurrer and argument the decision is made 3 Bl Rep. 1132. The declaration must follow the suggestion and thus this action is regularly proceeded with.

10. If it is adjudged in the hearing of the cause that the party recovers damages & the writ of prohibition stands commanding them to proceed no further.

Writ of Prohibition

11. But if on the trial no cause of prohibition appears the Court awards a writ of consultation that amounts to a record of a writ of prohibition. 3 Bl. Com. 110-4 Bac. Abr. 248. n.

12. There are cases in which the Court would award a writ of consultation, tho' there were a previous writ of prohibition, which amounts to a recovery qu.

12. This writ of consultation may issue in two instances after award of prohibition. In the first case it may be awarded after the prohibition for error, at the suit of the party thus prohibited 3 Bl. Com. 114. Secondly it may issue without action, upon mature deliberation the Court conceive the prohibition unnecessary

13. Disobedience to this writ is a contempt of Court and punishable by fine and imprisonment. Fitz. 40. 4 Bl. Com. 287

14. After a writ of prohibition if the party prosecuting in the Court below commences a new suit in the same Court it is a contempt of Court. 1 Lev. 111. 4 Bac. Abr. 262.

On the writ of attach. for contempt not only is the party punished for the contempt. But the party complaining recovers damages & costs from the other party proceeding after he was prohibited Bro. Cas. 349. 3 Lev. 300.

15. In this State a Statute regulating the mode of granting this writ in the Superior Court, but there can be no impropriety of noting this power by that, because it is a writ always incident to the Superior Court of common Pleas & Courts that the Court have inherent this power, by further that Regulations vide. Stat. Court. Revisal of 1821. n. 314.

In Statute Regulations respecting. Mandamus. Prohibition. & quo Warranto. vide. Revisal of 1821. Title of Court. P. 314-15.

Writ of Habeas corpus

1. This is by far the most important writ of any mentioned of the prerogative writs.

2. This is a writ by which a person restrained of his liberty is set before some superior Ct. for some lawful cause. When this court the same is set by the discretion of Justices or by a Statute 31 Car. 2. c. 31.

3. 1st. Of this writ the Queen's Bench are supreme for this is a writ of "Habeas corpus ad respondendum." This lies when one person has a cause of action against another who is confined by process of some inferior Ct. in order to remove the prisoner & charge him with the new action in the Queens. Bench. As a person confined in a City Ct. of London. and having a cause of action in the Com. Pleas he may be discharged by this writ of "habeas corpus ad respondendum" 31 Car. 2. 2 Mod 178. 3 Bac. 2. tit Habeas Corpus. & now the writ is the first process in this County

Habeas Corpus.

2. Secondly. Writ is "Habeas Corpus ad Subjiciendum"
This issues when party is in prison and the Writ wishes to bring him up to have him with Execution. Where that is not necessary, as in this County where the party is in prison he can be served with Execution 3 Bac. Ab. 12.

3. Thirdly. Writ is "Habeas Corpus ad faciendum, et recipiendum."
This lies when a person himself is confined in a Court below, to remove him to the K. alone. And the records of proceedings are removed by "certiorari". 1 Mod 235. 5 Mod 198. 3 Blk. 130 3 Bac 213.

1st. This Writ is demandable of Common right without shewing cause or any preliminary proceedings. This writ instantly supersedes all proceedings in the Court below so that all further proceedings thereon are coram non judice 2 Salk 506. 3 Salk 350 Salk. 352 12 Mod 666.

2. There are cases in which this Writ is not granted tho it is called a matter of right. If it not given when the effect will be to abate a regular suit commenced in the Ct below. This writ in favour of persons will give in such a case but when the detention of the party is proper imprisonment, the Writ will give no proceedings. 2 Salk 3 Bac 16.

This writ is not used in this State, but in the State of N York. & I think it is in use in many of the States. It appears in the State Trials the necessity of a certiorari

Habeas Corpus.

4. Fourth writ is "Habeas corpus ad testificandum"

1. This is not when a prisoner is detained in the Kings Bench or Fleet & he is taken out by any other means the sheriff would be guilty of an escape. 3 Keb. 57. Comb. 9. 45. 3 Bac. 3.

2. It has been determined in Eng that if the King demands the custody of the writ and took the prisoner from confinement he is liable. But this is now entirely excluded 2 Co 44. 1 Sid 13. 2 Bac. 238.

3. But if the sheriff or officer in bringing up the prisoner gives him any unnecessary liberty, or if he permits him to go at large he will be guilty of a voluntary escape. & if the sheriff shall take a circuitous route to where he went 60 miles with the prisoner out of the way. He must bring him up in a convenient time, and in the nearest way 3 Co 44. Hob. 212.

4. There is no class of prisoners who can never be bailed up by this writ besides any one. Lies court. Those are persons of war. the reason is, they cannot have recognizance in their own. It belongs to the Executive Government and not the Executive it is discretionary to grant it or not. Dy 403.

Besides these there are some several writs & rules & orders which you will find in 3 Bac. Ab. Habeas Cor.

5. The Writ and principle writ is Habeas Cor. ad. subjiciendum.

Habeas Corpus.

1. This writ is directed to the person detaining the prisoner in custody to deliver him up that he may do, submit to, and receive whatever the Court may award. This is the great Common Law writ securing the rights and privileges of citizens 1 Bur. 631. 3 Bl. Ab. 131.

2. This a writ by which relief may be had from every species of illegal confinement 16 & 31. Car. II.

3. A person imprisoned by the House of Parliament cannot be discharged. A person confined for contempt may be bailed up but not discharged. 8 T.R. 314.

4. This writ may issue by Ch. Just. Bench and now by statute from Common Pleas & Exchequer. 2 Bur 856. 2 and 198. 3 Bl. Ab 131-2. But where the party has been committed for a crime the Ct of Com. Pleas & Exchequer can only take bail & remand him. Such is the rule of the Com. Law. 3 Bl. Ab. 132. But under Stat of 16 Carlos. II. the full benefit is granted by either of these Courts. They must bail or discharge. 2 Hawk 78.

5. In this Writ it may be issued by the Superior Ct in person, & is executed by any of the judges of that Court, by the Ct of Com Pleas in term time & by the Chief Judge of that Ct in vacation.

6. This writ is directed to the Sheriff & other person detaining him, commanding him to produce the person with cause of detention. Salk. 350. 2d Ray. 615. 3 Bl. Ab. 131. The Gaoler or person detaining must alter the writ if delivered to him producing the person at the bar. On the person's coming & return being produced. the Ct must discharge the prisoner, admit him to Bail, or remand him to prison. One of these two must be ordered by the Court. 5 Mo. 22. 1 Burr. 330. 346. 3 Bl. 134

7. The great object of this writ is to afford speedy relief to all persons restrained of their personal liberty, confined without a legal cause. This writ issues to inquire into and relieve in every manner an action for false imprisonment, after the discharge.

8. Since the Stat. 31 Car. II. c. 2. this writ issues by any of the twelve judges, in vacation, to discharge any person committed by the privy Council, Chancellor, or the King's Bench. 3. Bl. Com.

But a person committed in a civil cause or an criminal offence cannot be by this writ discharged. The words of Car. II. c. 2. are not general ones here only declaratory of the law in conformance of the Common Law. This Stat. does not discharge a person committed in certain cases of felony 3 Bl. Com. 136. 1 Mod. 429. Stra. 142.

9. This action will lie in favour of wards confined by their guardians, children confined by their Parents, and wives confined by their Husbands. The order obtained in Court in case of Habeas Corpus is to command the body to go where the plaintiff or Writ of the Habeas aquis confine lies he is guilty of a contempt of Court. 3 Keb. 526. 2 Lev 128. Stra. 982.

10. This writ issues upon the application of any third person. The Law does not require the person confined to apply for himself. The writ may be issued on application of any friend Stra. 982. 1 Bac 606. 631. 5 Mod. 21. 3 Bac 1362.

Punishment:

11. Disobedience to this writ is punished as disobedience to any of the other prerogative writs.

12. By the Const. of the U.S. This writ cannot be suspended except in time of rebellion or invasion, and the Public safety clearly requires it and Congress in such case only, must determine. Const. U.S. Art. 1. Sec. 8.

Sheriffs and Gaolers.

Sheriffs and Gaolers

1. The term Sheriff signifies the governor & keeper of the Shire or County. 1 Bulk 339, 343.

2. The Sheriff must reside in the County for which he is appointed for regularly he has no jurisdiction out of his own County. 4 Bac 435.

3. But if it is necessary for the execution of an Office act regularly commenced in his own to go into another county he has authority so to do in that act.

4. So also if a plea in one county the sheriff may summon and take him. Plow 37. and in auctoribus,

5. A Sheriffs Authority sometimes intermits his Office. thus If he has Cep. an Execution & goods in hopes sale he is removed from Office. yet he may proceed to sell, for as a general principle the Exec" if proceeds in an entire act and an act indivisible, so that this last act is deemed to have been done while in Office. since it relates to the first act the whole proceedings are deemed, but see 4 Leak 323. Cro Jac. 73. 557. 1 Rol 893-4.

The same rule holds as to constables,

Deputies

1. A Sheriff or Gaol. may appoint Deputies & Substitutes, who are his representatives in his Official capacity since they may execute all the attending ministerial duties of his Office. their acts being his acts, Hob. 13. 4 Bac. Abr. 437.

Sheriffs and Goalers.

2. Every deputy is removable at the pleasure of the Sheriff for he is but his servant. But while a deputy acting remains in office by permission his power results from the appointment by operation of Law. And tho a Sheriff may appoint & remove a deputy he cannot abridge his power. Salk 95. Hob 13. 4 Bac. 437. Where a Bond is conditioned by a Deputy to his Sheriff not to execute process of a certain description as not to execute process within certain parts of the Sheriffwick is void. For it is against Law. For a deputy is bound by the law to discharge all the duties.

3. By the Com. Law. the Deputy acts officially only in the name of the Sheriff and not of his own. name process is never directed to the deputy but to the Sheriff neither can it be returned in the name of the Deputy but in that of the Sheriff only. The Deputy is never considered as a known public Officer but as a substitute a servant of the Sheriff. There is no such thing known at the C. Law as directing process to a deputy and a return in his own name Comp 65.

4. The Law of Connt differs from the C. Law. a Deputy is here a known public Officer and process may be directed to him & returned in his own name

5. A Deputy cannot delegate his power for it is a principle both at Polities & civil Law. that a representative cannot delegate his power. A Peer in parliament can vote by proxy for he acts there in his own right. But a member of the House of the H. of Commons cannot for he is a representative. Salk 96 4 Bac 442.

6. But tho a deputy cannot delegate he may lawfully be assisted by another in the discharge of his duty. or

when it is necessary may command assistance and them commanded are bound to obey. Hence he may command one to bind a prisoner, or to make an arrest in his presence. The case in Modern may seem to contradict this but there upon the arrest is not to have been made in the deputies presence. vide ante.

7. If Sheriff direct his warrant to two persons either of both together may make an arrest under it, This is a general as to public authorities not private. But in private authorities the rule is different Lit. Cokes. 181. Sec 167.

8. If a Deputy is guilty of any wilful neglect of duty as negligence by suffering an escape, the Sheriff may have Indictm. or the Case against him. For the Sheriff is liable to the party injured. Hence he is entitled to an indemnity from the deputy. vide for the Deputy gives security to the Sheriff vide, which can be would have remedy on the bond. But then is no need of a bond to subject the deputy. for he is liable on his universal contract to execute his duty faithfully Hole 98. 4 Bac. 492.

9. A Gaoler of the common Gaol of the County is a servant of the Sheriff. he is ipso facto an under Sheriff and removable at the will of the Sheriff. For the Sheriff is to appoint keeper of the gaol in his County. But he is not to of any other prison than the Common prison of his county. 4 Co 94. 9 id 118.

10. A Sheriff has regularly no right to confine a prisoner, in any other place than the Common Gaol of his County. That being the place appointed by the Law. If he confines in any other place he is guilty of false imprisonment for he does not act under the authority of the Law. 5 Bac 171. Salk. 408. —

Sheriffs and Gaolers.

11. As he is ex officio keeper of the common Gaol. it follows that there is no common gaol in his county & that he is not liable hence he cannot be entitled and in his own county a civil process for the goal is his the profits. and all are under his controll Latch 16. 2 Lev. 199. 1 Wood 198.

When above a question in this case in N York. where a Sheriff was attached in a ca-sa. and the Court held that the coroner might make a prison of his own House and there confine the Sheriff 6 John 22.

I have always doubted the correctness of this decision for this, at C Law a Sheriff has a right to retain a goal and it is his duty so to do yet I find no law thus authorizing a coroner.

12. By the Eng[l] Practice a Sheriff may be attached on mesne process, but cannot be actually, but must be discharged on common bail. he can be arrested on a civil suit, he cannot be detained. for the law requires that he is kept in custody must on arrest. be taken to the Common goal, but we have seen that the Sheriff cannot be confined there, for the goal is his and from this rule it follows that a civil process he cannot be arrested.

13. I have found no provision of the C Laws. regulating criminal process vs the Sheriff. But I conclude when he is arrested on criminal process, he may be confined in the Gaol of another county.

Sheriff's liability for the acts or defaults of his substitutes

1st As the Sheriff deputes in his servants or substitutes the Sheriff is bound in many cases for the acts and defaults of his deputes 8 Co 98. 2 Lev. 158. 1 Ven 314, 3 Co. 89.

The principle of this liability is generally stated to be the same as that of the liability of a master for the acts and omissions of his servants. Hence in many instances the acts and omissions of the Deputy are in law deemed the acts & omissions of the Sheriff. Hence it is that the Sheriff is permitted to take security from the Deputy for the faithful discharge of his duty. Stile & Sha. 18. 4 Bac 441.

2. The general rule of this liability is that the acts of the Deputy in his official capacity as to all civil purposes are regarded as the acts of the Sheriff he is liable civiliter hence for a damage sustained by the mis-charge of his ministerial duty but is never liable criminaliter for to be liable he must in person have committed the offence. The law never by any of its fictions imputes to one the guilt of another. But in a variety of cases it imputes the wrong to another & one. was to render the latter liable "civiliter" Latch 187. 1 Ld Ray 574. Doug 42. Co Jac 330.

3. For the Deputies official acts then the Sheriff is liable but not for his private torts. the same as the non liability of the master for the torts of his servants. for when committing a tort he is not in the discharge of his official duty. 2 Roll 94. Cro E. 175. 1 Lev. 146 Hence it has been doubted if a deputy keeper can

Sheriffs and Gaolers.

vs A on the goods of B whether the Sheriff is liable. and Bacon. says that "he does not act under his Authority hence not an Officio act. But it is now settled that the Sheriff is liable for that the Deputy act officially - tho. tortiously for he acts under the authority of the writ. 4 Bac 492. 3 Mod 309. 2 Blk R. 832. Doug 42.

And if this an trespass will lie vs the Sheriff as if he had done the wrong in person. in this respect the answers between a Sheriff & Master fails. For the master for the wrongs & wrongs of his servants in the discharge of his duty would be liable in "Case, ors Doug 42. 2 Blk R 832, Nor 272. Keb 352. The reason of the Sheriffs liability in Trespass is an anticient one. viz in Law it should and all his deputies constitute but an Office, 2. Blk. R. 834. 2 Keb. 352.

1. For the Deputies Official defaults the Sheriff is alone liable (but for a position that a misfeasance either are liable.) & the deputy should suggest to except for which the Sheriff is alone liable Cowp 403-6. Salk 18. 5 Co 89. But the Sheriff always has his remedy over against his deputy but for misfeasance either. or will this distinction is this a mere misfeasance for (which) Sheriff is alone liable * but for a position that a misfeasance either are liable Salk 18. Cro Jac 330. Cro 603. Cro C 175. 763. 3 Mod 321. The reason of this is that in the case of a misfeasance. a deputy is not liable for that not a known public officer nor acts in his own right he does not act in his own name neither is process directed to him. hence no writ can be had to establish a report in him as if an action was intended it must fail. But in case. will lie vs the Sheriff

for the precept directed to him can be executed.
But in positive tort or misfeasance the party injured may consider the Deputy as a private Tort-feasor the Plff is not bound to enquire into what pretended authority he acted, as when he takes the goods of B. on an Ext. vs A. But in favour of Sheriff he may be called at all events to answer his official excesses (But (in Sheriff) Action cannot be maintained out of an action)

5. A Sheriff is never liable for the act or neglect of duty of a private Deputy appointed at the request and at the nomination of the Plff, and at his own risk 4 T.R. 120. but Dig 67.

6. By the law of Comm. a deputy is liable for a neglect of duty as for positive torts. for him they are known public officers and process is directed to them and returns made in their own name. The same rule holds and applies to a Sheriffs gaoler

7. If after the death of the Sheriff and before the appointment of a new one an escape is made then is no one known to the law liable the Sheriffs heirs dead before it happened his representatives cannot be held neither are his substitutes for as Deputy their authority expires hence. There is no gaoler &c 3 Co. 72 b. & E 366, 306
When one is appointed to succeed the deceased Sheriff the appointee has the power of execution Mod 14. 4 Bac 445
When is no express provision made in the case of the death of a Sheriff for a gaoler is no more bound to discharge a prisoner than he is to keep him, he therefore must remain "in statu quo. Keeping the keys in his pocket

and unless the prisoner can execute gaol, they must remain prisoners,

Authorities and duties of Sheriffs

1. In Eng^d the Sheriff is a judicial as well as an Executive and ministerial officer here he has no judicial power, & shall consider him then only as a ministerial Officer and Conservator of the peace 1 Bk 343. 1 Bac 448. 9.

1st As a ministerial officer he executes the law in relation to the command of some superior Officer as a Magistrate,

2. As an Executive Officer he is one who executes the law, without the command of any superior Officer but in relation to the law itself the Govr of a state the President of the U.S. and so in part are the heads of departments, so far as this act authorizes the direction of any superior,

3. In this character he is the conservator of the peace of the County, and is said, to be the highest executive Officer in the County, here he should be "of the county" as the Sheriff of the County of Middlesex where the King's Court sits he said to be the highest executive Officer in the county, Thus he may be "of the county" 1 Bk 343. 1 Kev 237.

4. The Sheriff may as officer without warrant apprehend and commit all who break the peace, or attempt it, and in Eng^d from this judicial power, arise them to the peace & for this he has a right and is obliged, to execute writs / warrants, &c powers &c. and command them to prison. It is his duty not only to defend

his county from intestine commotion, but also from foreign invasion, and in this case he may command the posse comitatus, i.e. every male of his county above the age of 15. years, except peers of the realm. 1 Bl. R. 343. 4 Bac 430. Sheff. A.

A Sheriff in connection has the same power in relation to State. As a Ministerial Officer he is bound to execute all legal process directed to him for that purpose, and on refusal is liable to fine and imprisonment. If the process was Civil, & private he is liable in a suit by the individual injured. who recovers damages. Rood 74. 1 Bl. R. 344.

We have a Statute giving a similar remedy P. 414

But by the Law as practised in Eng. he is not liable in a civil action. But neglect in the execution of a writ. but the practice is to rule the Sheriff to return the writ & if he neglects. to attach him for contempt. 2 Hen Bl. R. 233. Doug 446. 3 Bl. R. 291. Esp. Dig. 616.

In Court the criminal practice is to bring an action on the case or fine.

In the execution of this part of the duty he has the same power when meeting to disturb his duty to call the posse of his county as he has in his execution capacity Bac 453. 2 Hawk 193, 4 53.

We have a similar power in Court by Statute where your opponent is under a capias to be used against the execution of process. But our law allows him a commander in Chief to call out the Militia only against Indians. Vide Laws of Court. Sess. 1821. P. 415.

9. A Sheriff cannot break open a door or window of a mansion House to arrest the owner or seize his goods on a civil suit. This privilege is called the "right of Castle." The reason assigned by this right is, that one mansion house might not be exposed to be broken open by Thieves or Robbers but the true reason is, that it is a fundamental right for under that Law every man should be enabled to defend his castle as sacred, and could defend it against all Law. 5 Co R. Comp. 1. Co E 909. Hob. 2 & 62. Cro Jac 604.

It is said in the old Books that an actual breaking a mansion House is good, but that the Sheriff does well, that tho it is an incorrect doctrine It is now settled that the party is entitled to declare on Institution 5 Co 92. b. 5 Mod. 155. to the old rule. But that it is now settled. vide 5 Burr. 454. Comb. 1. 2 Bl R 823.

10. I do find it laid down in the Books what acts shall constitute a breaking, and I conclude it does not mean that acts as constituting a breaking in Burglary for if so the lifting a latch would be a sufficient breaking. I conceive to constitute a breaking in this case, that the acts be accompanied with violence as bursting a lock &c. and indeed the Principle of "Privilege of castle" in the Eye of Law is very obvious and Books have called it as sacred as possible, for any shutting himself in his House is an open act of resistance to the Law. Hence the privilege is confined strictly and it only extends to the outer part of the mansion viz Doors & windows and if the Sheriff can enter peaceably the entry is lawful and having entered lawfully he may arrest the owner. a Burglary tried

any mine door, chest trunk &c. having first demanded that they be openly opened and refused a neglect to do so, but if he does not demand them to be opened his offence is inexcusable Cro. C. 7, Keb 62. 203, Cro Jac 604-5, Lord 17, 327.

1. But this privilege of entry and window extends only to the person, but not to the persons property of any other person who may be in it. For if a is in the house of B. the Officer after a demand and refusal may break down the wall of the House, and it makes no difference whether it is A's person or his goods, But then can be no wanton breaking and it is indispensible that a demand be first made Keb 62. 5 Co 93-b. 1 Hal 138 & 186.

2. But in a criminal process, the privilege of castle is not allowed for public justice is of a higher nature, where this privilege of castle but demand here must first be made 5 Co 91. 4 B 454. The rule is, the same on a process to take one to find sureties for the peace for it is a crim. process, as in a process for a peacible entry and detainer, 12 Co 131. Mark. 606. 4 B ar 454.

So when one having committed felony is pursued by an Officer even by a private person. If to make the arrest it is necessary to break the Offenders House, the breaking is lawful. But if the person can only be suspected of felony & if he was taken as in this case without warrant the breaking and arrest and if no breaking the arrest is justifiable only in the event of the persons being found guilty of the felony, The case is the same of a Search Warrant 2 Hawk 139. 1 Bl R. 455.

So for the commencement of Public justice & thereby to suppress an Affray or prevent a breach of the Peace a Pr he is justified in breaking the house. finds it necessary to suppress the fame or in arresting the Latter to break the doors and &c. he is justified. 4 Bac 456. 1 Rose 66.

13. One Batchelar civil process. warrants after a demand & breaking the D.'s. a writ of "habere possessionem" for this then is a decision reason. for it is the very object of the process to put the Pff in possession of the House. Even from the nature of the case, entry is necessary for its execution 4 Co 91. b. 4 Bac Ab 455.

Subject of the privilege

14. The subject of this priviledge is confined strictly and nothing but the dwelling house of the Pf. and the buildings joind to it are within the privilege Even a barn or offices adjacent from the House may be broken & entered. 1 Sid 186. 1 Keb. 698. 4 Bac. 453. Last States, to be the law with regard to a State prisoner flown the Defts dwelling house and can be broken, unless the Defts lodges in it, then perhaps it might be considered as his dwelling house, a maxim formerly a State was regarded as sacred and could not be broken. But I was convinced that it could be broken as well as any out house, and on the first opportunity I made the experiment and find that I am right. It is the practice to break open doors without scruple

15. If a Deputy after a peaceable entry is locked in the Sheriff may break in to liberate him Co Ins 555. Palmer 52 4 Bac 456.

But if one is arrested on either civil or criminal

process and he escapes, he may be arrested again to accomplish what if necessary to break the doors & windows of his house to retake him the officer is authorized to do it. for the original arrest attaches in the officer a right in his person and his escaping to his own house was as much theirs as if he had stolen the writ. Parmer 546. Mod 173. 1 Roll R. 138.

If one is illegally arrested by breaking his house, & rescues with assault & battery the latter is good unless it appears that there was collusion between the officer & party and that the first arrest was made to enable the second to be made. 2 Blk 823. Esp R 505 & 5.

There are some cases in which an arrest is void by Stat. 29 Car. 2. which prohibits an arrest on civil process to be made on Sunday and if an arrest is made on that day it is void and the officer is guilty of "false Imprisonment" Salk 78. 1 Bac 456.
Whether this includes the whole 24. hours of that day has been a disputed question in this State, and the Ct of Errors at last decided that it includes the day season only, the period between morning & evening twilight. 2 Conn. R. 541. But this State relates only to original arrests. for a prisoner who has escaped may be retaken on any day. Salk 626. 5 Y R. 25. 6 Mod 45, 253. 2 Ld Ray 1028. The Statute does not expressly enact this, but it arises from construction. This Court. Stat. Laws, relating. Tolles Stat Rep. 1821. 386.
And whenever one has been arrested on the Sabbath, he will be discharged on motion by the Ct where process is. 6 Mod. 95. 5 Mod 94, Bac 456.

Law of Escapes,

1st An Escape is an unlawful evasion of legal restraint of custody 2 Hal 4 Bac 233. Escape A.

2. Whenever one under lawful arrest, restraint of his liberty, either privately or publickly elude the restraint & is suffered to go at large before discharged by due course of Law. he has made an escape and the officer who had him in custody is guilty of an escape, is Ack.

3. But for an Escape it is essential that there be in the first instance a legal arrest. for the evasion of an illegal arrest is no escape in Law. Esp. Dig. 607. 9 Cow 165.

Of what sort Arrests

1st The arrest must be in pursuance of Lawful authority and be lawfully made, for if it is not only unlawful, but tortious, What Lawful Authority may exist in some instances without a warrant, 4 Bac 455. The arrest must be made in pursuance of known authority & this is a general rule of our Law. that if the Court by whom authority the process issued has jurisdiction of the subject matter and the parties in regular and the arrest under it is lawful. If the party arrested is allowed to go at large. It is an escape and it is no excuse that the precept was erroneous for the arrest is justifiable under the precept is void Bac Ab Escape A. Esp Dig 333. 391. 695. 2 Hals 384. 8 Co 141. C.

2d When the arrest is on mesne process. the Deft goes

Of Arrests,

or Cap. is not necessarily an escape for if he appear in Court or appear on a day assigned in Court according to the rule of practice it is sufficient. For the only reason here is to have the Deft on the day of trial so that he or his Bail would respond the Judgt. But on final judgt it is otherwise for there there is no such thing as Bail. 3 Blk 290.

But under our law if the Deft is forthcoming within the life of the Execution it is enough. for no appearance of the Deft is necessary for on capias to give judgt.

3. But if the Ct. have no jurisdiction of the Subject matter both parties and after made on it avoid him or put an end there can be no escape, and this rule is universal. Bac. Abridg. Escape & Esp Div 608-9. This rule has some qualifications for the Court held that the process is in force & you can say it did not so often upon the face of it the Sheriff was not liable Keb & Kelb 110. 182 I suppose it must be Kelby - N.C. Just Kelly but Kelby.

4. In the practice of Court Vermont & some of the States, the last gen. rule does not comprehend all the cases, for mesne process is not always returnable to the Court out of which it issues. The Rule is that if the process is strictly regular & issued by a Ct having full authority and returnable to a Court having competent jurisdiction, the arrest will be lawful and the Sheriff clear from any liability but if it is the contrary it is void and the Sheriff liable.

5. But in certain cases the precept may be void from irregularity - as if the writ is made returnable to any other than the first term to which it is. Save it can be made returnable. For such a mistake makes it utterly void and all the proceedings under it. For here the irregularity is apparent upon the face of it. 3 Wils 341. & 4 Dig 238-9 608-9. Salk 273 Cro E 148. Carth 148.

6. The reason of this is obvious for if the P/S could execute it by the first Term he might make it returnable any number of years a Head of 20. and if the precept was not void but voidable only the D/P could not be confined in prison for that length of time, unless he could obtain bail, and then would be seldom an one who would enter bail for such a person.

The rule is "a Ct. having competent jurisdiction of the subject matter, But a Court may want jurisdiction when the subject matter is within the jurisdiction for the parties may be privileged. by the rule is meant when the Court has jurisdiction over the cause of action without relation to the parties or the place when the cause arose.

7. At Com Law, an Officer having made an arrest on final process, cannot delegate to a stranger a right to hold the person in his absence, for that a proceeding is an escape for it is an abandonment of his duty and if the stranger should keep him he would be guilty of False Imp? 1 Bacquet & Sellon 24

Of Arrests.

But nothing is more common in this State than for a Sheriff to make an arrest and allow the prisoner to a private person, to every person. this has always passed Subsidentis, but is wholly irregular and illegal

2d. Requisites

3 Every arrest must be actually made or there can be no escape.

9. Bare words never constitute an arrest so if the Officer shou'd say "You are my prisoner." I have a writ against you," if the party escape from him there is no escape. It is necessary that the Officer touches the person, or that he has full power to take him and the party acquiesces in it this is unanimous to touching him. Bac. Ab Escape a2. Esp Dig 604. Salk. 79. 586.

When the prisoner submits to the power of the Officer, or follows when he arrests, it is an arrest.

10. If one is arrested at the suit of A and while he is in custody on this suit a writ in favour of B. is directed to the Sheriff against him. he dept is in fact by construction of law in custody on the suit of B. for then the Sheriff shou'd touch him again would be superfluous, and should in this case there is an escape the Officer would be guilty of an escape.

Salk. 237, 5 Co 89. b. on both suits.

But this rule cannot hold in our practice for it supposes the process to be a capias. but our writs against the dept to take the property & person of the dept and the Plff has his election what the Officer shall attach, But if a second writ was on delivery to the Officer is in fact.

an arrest of the person. The property could not be taken
Hence the Writ in the second case could not learn his
election

11. 5. Requisites. The arrest must be regular & legal, or the
writ then can be no escape.

12. 1 Vin. then there must be in all cases even a Writ.
and if not there is no escape on an arrest, Comb. 64,
Esp. Dig 604. Bac Escape. A. 2.

13. 2 Cro 3 An Arrest to be unque must be done by the auth-
ority of the officer to whom the precept was directed
either by him in person or by his assistants or followers in
his presence. But it does not require for the validity
to such an arrest that it should be in the Officers
actual presence as if it is necessary to follow and
a stone a mere power to take a prisoner and if
the Sheriff is on one side, and the assistants on the
other side, under the arrest, over by the order of the Officer,
This is a valid arrest.
The rule requires nothing more than that the Sheriff
be out and engaged in the same arrest. Comb 65. 6 Mod.
211. Esp Dig 604.

14. 3 Vin If an arrest is made on sunday the Officer is not guilty
of an escape if he suffers the prisoner to go at large
for the arrest was void and against Law his assistants
at least as a necessary consequence of the rule 6 Mod 85.
Salk 78. Esp Dig 605.

15. So if an arrest is made by unlawfully breaking open doors
or windows, permitting the go at large is no escape
Comb 9. Esp Dig 604-5.
Perhaps this proposition may seem a dangerous one
since the right of the person to be discharged on motion

is not strictè Juris. but at the discretion of the Court, But it would be absurd to say that the Sheriff was bound to continue an action which was extinguished by course an act for which he is personly killed. and the continuance of the action would have the effect to aggravate his wrong.

16. If a Sheriff having an opportunity to arrest one against whom he has a precept and omits to do it, shall the Defr. ever after elude the Officer, so that he could not take the Officer is liable to the Plff. but indeed for an escape for there has been no arrest, but for his neglect to arrest when he had it in his power 2 Wood. 23 or 100 - 4. 10 ib 251. 255. Lake 331.

4th Mode of arrest.

1st An Officer executing a general authority is not bound to shew his writ or warrant before he makes the arrest. or when it is directed against the goods of the Defr. before he has seized them. & this even tho expressed to shew his writ &c. This rule of all Sheriffs Deputies & Constables within their respective jurisdiction, But after the precept is executed, the Officer is bound to shew the precept, else the Defr will be totally ignorant of the purposes of the arrest. or the attachment of the goods &c. as the case may be. 4 Co 67. Cro Jac 485. 8 Mo 187. Esp Dig 604.

2d But when the Officer having a precept writ &c granting only a ministerial authority he must if required to shew the writ, he must. before he can make the arrest and if he does not the Defr may resist him even to death. for the Defr is entitled to evidence of such an Officers authority. But the Officer is not bound to shew

it in the first instance much requested. This applies to all Specie Officers 4 Co 69.

Escapes are of two Kinds. Voluntary & Negligent
3 Co 52-3. Blk 415.

The former is one that takes place by the consent of the gaoler or their Officer having the custody of the Prisoner The Latter is one that happens without the gaolers or their Officers consent. 3 Blk 415.

I will premise that no lawfully committed to prison must be kept in safe custody untill discharged by due course of law. As if an Officer should suffer one thus committed to leave the limits of the Prison even for one moment, he is guilty of an escape, and this holds both of commitment on mesne and final process. 5 Co 44. Bac. Escape. B.1. Rolle 806 3 Blk 415.

1st Voluntary Escapes.

1st If a Sheriff or gaoler admits to Bail a prisoner not by law bailable, he is guilty of a voluntary escape. and if he permits one to go at large from the prison for a single moment it is an escape even tho he entrusted him to the care of a keeper, is law.

2nd If one arrested on final process is permitted to go at large even before he is committed to prison the Officer is guilty of an escape. 2 Mo. 176. 1 Bl. H. 26.

3rd But as to persons committed on civil process. they are not deemed to be at large while confined within the gaol limits But when committed on a criminal process must be confined within the actual walls of a prison the former by indemnifying the Sheriff against his escape may at his discretion be admitted

Of Voluntary Escapes.

to the limits of the prison yard. 2 Y.B. 126. 131. -

4. It was once held in Eng. that if a prisoner committed on an execution was bro. up. by a writ of Habeas corpus ad testificandum. that the Sheriff was guilty of a voluntary escape, Bac. Escap. B. 2. 1 Sid 13. Then can be no provision made sufficient for it results in this. If the Sheriff refuses to bring up the prisoner he incurs fine & imprisonment & loss of his Office If he does bring him up. he is guilty of an escape. The only authority that entitles this direction as being about is Buller 99 & 79. This is Expended.

But if in bringing up a prisoner he grants him any unnecessary liberty or indulgence he is guilty of a voluntary escape. as regards this it is a rule. that he must bring him up in the most convenient and direct way. Ld Raz 241, 399, 788. Bac Escap. B. 2, 6 Mod 78. Cro Car 14.

5. An Officer having made an arrest on finale, process must convey him to prison, within a reasonable time, otherwise he is guilty of a voluntary escape 1 B & P 24 2 Y.B 176. and this because the law intends imprisonment as certain means of bringing the debt to pay the judgt and this intention of the Law the Sheriff shall not defeat, for if he could unnecessarily delay in any case he might in a year & so on. But this does not hold if some proceeding for the object of the law in such case is obtained of the prisoner is for the purpose, is made.

The rule is the same on finale process if the Officer entrusted the prisoner out of his custody under the rule to keep for he cannot delegate this power. even if it is a part of his duty or on abandonment of his prisoner, is made,

Sheriffs and Gaolers.

6. When one is committed on execution the Sheriff has no right to discharge him on his paying the whole debt, and should he discharge him he is guilty of a voluntary escape. Cro E 404. Bac Ab 76. 2 Ld Ray 1 Mod 44. 8 Co 225, 366. The reason is that as he is not the Atty of the Plff and that as he had had no such authority given to him by Law. His acts in this respect is that of a Stranger. After committing his only duty is to keep him so.

7. On the same principle if he is directed to take the body of the prisoner and he discharges him on some pretence he is guilty of a voluntary escape. For this his duty committed only in taking the body of the Defd

8. But if the Plff means the same by what he commences his action vs the Sheriff for the escape, it is deemed a ratification of the act, and consequently amounts to an escape. 14 East 468. Ld Ray 399. 12 Mod 214.

9. But this rule does not obtain where the prisoner is taken upon mesne process. A holds an a Ca. Sa. against the body of the Defd. But has the writ issues against the person as well as the body and the Sheriff has no right to detain the body on presentment or tender of the debt.

10. If a Sheriff means a common after commitment he is guilty of a voluntary escape for he cannot keep his prisoner confined. Mod 17. Bac Escape. B. 3.

11. If a Sheriff appoints one of his prisoners turnkey of his gaol he is ipso facto guilty of a voluntary escape. But I conclude it means quoad this prisoner only. The reason of the rule is not the more obvious, but I conceive it is founded as a consequence of his custody. Haldin 311. Esp Dig 618.

Negligent Escapes.

12. If a person having the liberty of the limits of the gaol yard manifests an intention to break them, as by once going without them, the Sheriff is bound to recommit him and if he does not and the person breaks the limits a second time he is guilty of a voluntary escape 2 T.R. 131.

13. But when one having the liberty of the yard, escapes before an intention of an escape was discovered in him, the Sheriff is guilty of a negligent escape only, unless the prisoner was admitted to the limits by a decree of court with the Sheriff then on an escape of this kind he would be guilty of a voluntary escape. 2 T.R. 131. 1 Roll. 106, 127-8.

14. But the Sheriff tho he has the right to grant the liberty of the limits, yet he is not bound so to do even tho a bond of indemnity was offered, for the law will not oblige him to incur a responsibility. But in Comt. he is compelled to admit to the limits a sufficient indemnity has given.

At C Law tho he had admitted a prisoner to the limits yet he could at any time recommit him at pleasure and this without assigning any reason. 2 T.R. 131.

E. Negligent Escapes.—

1. If one could restrain by force a by force escapes, the escape is negligent, but this supposes no consent a collusion on the part of the officer and also that he violence was not a sham but an actual resistance So if one breaks prison by a picture to which the Sheriff was consenting - and to which he did not consent the escape is negligent Cro Jac 419. Yelv 76 & 96, 130, 3 Bulst. 116.

Sheriffs and Gaolers.

Difference between an escape on meane and escape on final process as to the consequence. 3

1. If the Deft after arrest upon mean process is permitted to go at large even before commitment, the Offr is guilty of an escape. 3 Bulk 415. 2 Hk. 122. Cro Jac 656.

2. If the Sheriff enlarges one taken on a mean process on a Security given that the Deft shall be ready to render the Sheriff is guilty of a voluntary escape, and the Security also is void, for if this were not the case it would defeat the ends of the Law intended by imprisonment, and when he has once discharged the prisoner he has no power afterwards to recommit him, and if he should it would be false imprisonment. Sir. 2 Rol. 133. The Security was held good. (or the recognizance) but it is not Law.

3. If he discharges on on security to pay the debt he is guilty of a voluntary escape, and the security is void, as above.

4. But one arrested on meane process, before commitment may be permitted to go at large provided he is forth coming on the return day and is no escape. 2 Bulk R 1049. 3 Bulk 415. 2 Hk 172. Salk 408. 5 Mod 37. 2 Mod 295. But if the Deft is not forthcoming the Officer is guilty of an escape, but a negligent one only, And it is on the principle of his liability in case of a non appearance, that he is permitted to take bail. 2 Roll 98. Cro E. 23. 652. 868. 2 Mod 294. Cro Jac 604. But if one arrested on mean process is after commitment suffered to go at large, but for an instant only the Officer is guilty of a voluntary escape, for when once committed he must be kept in close confinement for the time is passed in which the prisoner had opportunity

to give bail. But in the time allowed to give bail should the Officer return to give bail he would be liable to an action by the former. 2 Mich 294. Esp Dig 600, & 610. Jab & 271.

5. And should the Off. prosecute his suit to judgment against the Defd who was enlarged, it is no waiver of the escape. Esp. 2 Mich 294.

6. But in Count. by Stat one committed on mesne process is entitled to be discharged if he procures a bail bond.

7. When an Officer suffers an escape on mesne process the Plff has an action against him on the Case, & declare, the damages all presumptive the Plff cannot support this action unless he can prove a right to recover the debt who escaped for if he had no right to recover he has sustained no damages, tho the escape, & the officer was acting quo it was an abuse in point. 2 Mich 295- 2 J.R. 129. 4 do 611. Buc. Escape K 2, 2 Lev 85. 5 J.R. 401. Stu 893.

8. Observe by the way. that an acknowledgment of the prisoner or of Court that he was taken at the Plff. is admissible evidence in a suit against by the Plff. 1 Ch R 169, Peake R 5 & 65. 4 J.R. 436.

9. In an action against a Sheriff for an escape on mesne process the Plff has no remedy in establishing his claim against the debt escaping for the judgt is conclusive evidence of that fact, vide 3.

10. But for an escape on final process the Plff. to the judgt has his election to debt. or to sue under the Statute against the Sheriff 2 J.R. 129- 132. 2 H Bl R. 10. 113. Esp Dig 203. 25. 1. Rich 2. Stu 152. The duration of these duties is to prosecute the indebitatus assumpsit against Defd & the Sheriff, and this extends to escapes on final process, & the Statute

before or after commitment. The effect of these words may be very different for in Case, as the damages are discretionary, the jury may give a less sum than the original debt due from the original defdt for this action is not regarded as instituted for a recovery of the debt, but damages for the loss of the original action 2 Bk. 129. But if debt is the action the jury must give the whole amount for which the execution issued. A recovery against the Sheriff bars the Plff's claim against the original Defdt for he treats the Plff as debtor in this action and will not admit satisfactions for the same cause. 2 T.R. 126-9. 132. 2 Blk R. 1048. 2 T.R. 132. Esp. 609.

11. It is said if in case special damages are only given against the Sheriff, the Plff may sue a recovery of the original debt. But N.P. 69. 2 T.R. 129. Esh Dig 611. 2 Mod. 295. This rule means that if such damages were levied in this action or the case. If the Plff obtains a verdict yielding to it or the Sheriff for the whole amount of the execution had as the original debt. That the Plff was bound of this recovery against the Deft with just 5 T.R. 40-1. Peake 124. 4 Co. 117. 3 Esp Cas. 208. 1 Doug 22. 2 Mod 295.

But it is my opinion that it is immaterial whether the Plff recovers of the Sheriff special or general damages, for he shall as I conceive sue again the original Deft for this is a suit expressly instituted for damages and lies on the Court to judge whether it was intended as a satisfaction for the debt or the Execution. Neither can a jury be bound to consider it as a satisfaction, but to suppose this opinion a rule of conduct is absurd. VII. The Defendt to the escape is a complete evidence

against the Sheriff in this action. But if a covenant from the Sheriff of full damages would discharge the Sheriff's liability he would be entitled in the event of the Suit and by another rule of evidence would be excused Peake Ev. 171-2. 1 R. 124, 2 Y. & J. 129.

12. By Stat of Comm. the jury are bound to give the full amount of the judgt & the whole execution debt. whether this will hold on construction of the Stat. I cannot divine.

Rescue

1st If one arrests on mesne process & rescue the Officer is excused. but a rescue on final process is no excuse, 3 Bac 416 Co Jac 419 Esp Dig 610 Co E 873.

The reason assigned for this distinction is that the Sheriff ought to have sufficient force to prevent it. But why more on final than mesne process. I cannot tell.

2d A Rescue after commitment is no excuse. except when occasioned by public enemies. For the law presumes that the Sheriff is able with his posse to defend his country against all force, excepting that excepted and this presumption the Sheriff cannot rebut, This rule holds of an arrest on final process. whether there is an commitment or not. Stu 482. 1 Coke 84 a. 1 Roll 808. Esp Dig 310 & 510. & 810.

3d In case of a rescue the original Plff may maintain an action as the rescuer. whether the rescue was made on mesne or final process. The in the latter he has a remedy as the Sheriff. yet he is not obliged to resort to it. Co Lit 436 & 486. Hist 180. Co Car 109. Hutton 98.

4. If the Pff sues the escape, he by that act waives his remedy against the Sheriff. this is not a point judicially decided. but on principle it seems a reasonable conclusion. It is laid down by Esp as Law, but it is not supported by the authorities he cites Esp Dig 657-9. 610. 6 Mod 211. Co Ln 57. & 109. Esp. cites Sutton 98 & 198.

5. It is said that the Sheriff may have either "Trespass or "Case" against a escape Hob 180. Co Ln 486. I do not see how he has Trespass for there is no violence to the person. and what the latter is by consequence I know of no instance when these actions are concurrent. when the same facts cannot appear upon the record.

6. In an action against the escapee the Jury are at liberty to give the Pff his whole original demand against the escaped in damages or a part of it only 6 Mod 211. Esp Dig 657. 659. It would seem from Bulle that if the jury gave damages to the amount of the debt. the remedy against the original debtor is taken away But as I have before said in analogous cases my opinion is that the remedy remains Bulle 69. Esp Dig 61 & 611

7. In an action against the Sheriff for a escape on mesne process, the return of an escape made by the Officer is conclusive, and the action cannot be defeated, but if the return be false the Pff has an action for a false return. Co 6 781. Comb 295. 1 Ben 224. 2 ib 175. The reason is that new official acts cannot be falsified except by proceedings instituted for the express purpose. of punishing them in law. for the Officer must have due re-

-tice of the intention, and must notice is given only by the institution of an express suit. For the purpose this rule is not regarded in Connecticut, for a return of an Officer may be falsified on a plea in demurr a Mennin.

8 It is laid down without qualification that the Sheriff can "take" against the rescuer. But it must mean only for rescue or prise prison when he is killed over. not on mesne process. I see no reason why he should have an action. Co Cas 7 7 a 109. Hut 98. Yel 180.

9. When the Sheriff is sued for a rescue he is not called against for a rescue eo nomine, but for an escape. & he has his liberty to plead a rescue. (his act) If he plead and his case admit of it.

10. If a Sheriff in bringing up a prisoner on habeas corpus, is detained of a prisoner by rescue the rescue is no excuse for he is bound to have sufficient power with him to prevent it. Stra 482 Esp Dig 610.

11. After an attempt even on mesne process and commitment, nothing will excuse the Sheriff from an escape but the act of God or public Enemies, 4 Co 84 a 4 T.R. 789. 2 Wm Blk. 113. Esp Dig 610.

Even the burning of a prison however great and irresistable the force may be as in the Great riot of St John Garden, when the prisons were burnt & thousands of prisoners escaped. The Sheriff was liable and parliament to relieve him passed a retroactive Law. So in the conflagration in 1666. which consumed a great part of the city of London together with the prisons. parliament passed a like law to shield the Sheriff from his liability — 1 Roll 808. Dyer 66. b. 2 Bac 247 —

Sheriffs and Gaolers.

Difference between Voluntary & Negligent escapes as to consequences.

1st. It was once held that in case of a voluntary escape (that) the party escaping was forever discharged from the debt a demand for which he was arrested. But this was merely vindictive to make the Sheriff liable at all events. by giving the Plff no other remedy. But this is now Law. for he has at this day a remedy against both and in any opinion a remedy at the Sheriff in case it be bar to a remedy from the escapee also. Hob 202. 2 Bac Ab. And after a voluntary or Negligent escape if an original writ he may have an action on the judgt and Law execution this a rule of the Com. Law. Hob 60. 1 Sid 330. 2 Mod 136. 1 Ven 4. 269. & By Stat 8 & 9 Wm 3 he may have execution on judgt without Sci-fa. Facias. the Plff may retain the person in the original Execution, without resorting to these civil remedies. This is now agreed to be a rule of the common Law. Exp Dig 611. Bull Ng. 3 Blk 41. 150 41.

2. If the escape is on mesne process and a voluntary one. the Plff may retain by an execution against. this holds also in negligent escapes. 3 Coke 52. b. 2 Mod. 295 Exp Dig 611.

3d. But the officer who has suffered a voluntary escape cannot retake (the person) or escapee nor sustain an action against him. for the escape for he is "pulteis criminis", and should he retake him he would be guilty of false imprisonment 3 Co 52. 1 Sid 330. 2 T.R. 176 3 Blk 415. 1 Ken. 267.

4. An a bond given a Sheriff to indemnify a voluntary escape. is void for as Lord Holt says in contemplation of Law it is a contract to do iniquity 2 Bac 213. 1 Pow

Consequences of an Escape.

Con. 196-7. 10 Co 100 or 100. b

5. But the Sheriff may retake him although he has escaped of the Sheriff & of the gaoler. provided the new cause was not when the original debt, that distinction is kept up. and it is my opinion he could have his remedy against the escaper notwithstanding the general damages he may recover of the Sheriff
Esp 611. Bulst. 69.

6. In negligent escapes the Sheriff may also retake & have an action on the case immediately, to indemnify him for his liability nec, for he is not particeps criminis Cro E 234. 3 Co 52. b. Esp Dig 612-13.

7. Or when the Sheriff has taken a Bond of indemnity as a negligent escape. &c. that the prisoner shall remain a true prisoner. he cannot have an action on the bond. that is the case of a gaol Bond to admit to the limits of the gaol, or that case he must resort to the bond for it is a surplus remedy
1 Rep 151. But if a bailiff who has suffered an escape has been subjected by the Sheriff, he cannot maintain an action against the escaper for, a person departs with "for money lent to his own use. 7 Mo. 161-2. 2 Mo Rep 218-19. 01 118. 219. The reason is that the Bailiff cannot recover it that he is not liable at law to the Sheriff for any illegal punishment such as is the case with a deputy. when he is liable it is in virtue of some express contract of indemnity, he stands in the same predicament as any indemnified who contracts to indemnify one person against the tort of another 1 Bl R 345. Rep Lac 349. Esp Dig 613. 2 Bl R 1 Esp Dig 613. In Bl R a certain case he found the character of a

Bailiff that he is a thereof officer subordinate for some particular official acts.

8 If one escapes on a criminal process he is punishable by fine and imprisonment, for it is considered as a Crime at C. Law. and if he escapes by voluntary permission he is guilty of felony at C. Law. 4 Blk 129-30. 2 Hawk 122, 123 & 128-9.

9. And if an indictment for felony and is suffered to escape by the officers negligence the officer is guilty of a misdemeanor and punished by fine.

10. But if a Sheriff suffers the voluntary escape of a felon his punishment is considered with that of the prisoner for he is an accessary after the fact and all the rules of accessaries after the fact apply in this case. 1 Hal P.C. 590. 2 Hawk 134. 4 Blk 130.

11. In case of a negligent escape the Sheriff has an Act. vs the escapee. It was lately decided at Nisi prius that when the Sheriff has been subjected to a voluntary escape, in an action Sheriff he had his remedy vs the escapee But this is denied by Ld Kenyon. Whereupon that the Sheriff cannot in such case maintain an action vs the escapee.

If the Sheriff had himself suffered a voluntary escape he could not recover for his particular damage, but when the escape is suffered by his deputy at jail I do not see why he has not a remedy vs the escapee for then he is not particular damage the only reason that subjects him to an escape penalties

Consequences of an Escape.

12. If after a negligent escape the Sheriff retake him a fresh suit before action brot. against him his liability is discharged but this explained "fresh suit" is unnecessary if he retakes before action brot. it is a discharge Hin 208. 5 Co 44. 52. 2. Jk. 126. 1 Vent 211. 217.

13. In Eng. the exception must be specially pleaded 2 Jk. 126. But in Comt. by Stat it may be given in evidence under the gen Issue.

14. But if action for a negligent escape is brot. before exception, a subsequent retaking is no discharge. for the action being brot. while the Plff had a right. he cannot by limiting a right to prosecute to judg.t and the Defts consent as in the above cases discharge himself a defeat this right of the Plff to recover. Cro E 657. Hin 873. 3 Co 44. 52. Cro Jac 657. Esp Dig 611.

15 And a voluntary return of the prisoner into custody on Neg. escape before action brot is a discharge of the Sheriff for this return is equivalent to a fresh suit Com R. 554. 2 Jk 126. 1 Bl. R. 413.

16 But in a voluntary escape recaption at no time is an excuse to the Sheriff and indeed he has no right to retake him for the act was an abandonment of his custody and as he was "particeps criminis" neither has he an action vs. the escapee. 3 Co. 526. Esp Dig 611-12. Further. For it is a general rule that if a pledge or right of custody is suspended the heir a pledge is abandoned forever. A recaption in a voluntary escape is no discharge neither is a voluntary return by the prisoner. 2 Mod 244. Salk 271. Esp Dig 612.

17. If after a negligent escape, the Plff discharges the escapee the gaoler has no right to retake him for his fees. But if the Plff discharges when the prisoner is in custody the gaoler has an retainder till the fees are paid, the principle of the gaoler having no right is that the debt is lost by the escape. for in an escape the negligence there is a supposed fault in the officer, and the principle is that as he has lost his pledge by his own default he cannot resume it.

18. If a negligent escape by one who has the liberty of the Gaol, the officer retakes a fresh seizure of the prisoner returns before action brot the Sheriff is discharged. for this the Sheriff voluntarily admits to the limits yet he is not deemed to be in the wrong. 1 Rool 1007

19. When one having the liberty of the yard has given a bail-bond this he should return (immediately) voluntarily after an escape and before action brot. tho the Sheriff is discharged yet he has his action on the bond. for it is broken, yet has he not suffered a loss. the damages will be but nominal. But after such an escape neither the escapee nor (Sheriff) can compell the Sheriff to retake the prisoner, tho he voluntarily returns. for as the bond is broken he may rely upon it for his indemnity 1 Rool. 127-8. security in the bail-bond,

20, The rule in declaring in an escape is singular. for tho in declaring the court lays a voluntary escape. the Plff may give in evidence a Negligent escape. and it would support his declaration. Hence in such cases the Sheriff may plead a exception without discovering the voluntary escape in the declaration 1 Vent. 248. 2 Mo. 125.

Consequences of an Escape.

The principle of this rule is that on the face of the declaration the Court take no notice of any distinction between a voluntary and negligent escape., and a distinction as per (La. Mansfield.) La Hale. is impertinent for the declaration should merely set forth an escape. But if such a plea by the Defft. how can the Plff avoid himself of in point of fact the escape was voluntary? He can if to make a "novel assignment" in his replication averring that it was voluntary (his conclusion,

21. For a voluntary escape the Deputy or Gaoler as well as the Sheriff may be subjected But if for such an escape the Plff sue the under Sheriff it is regarded as an election of his remedy then as a consequence the Sheriff is discharged this point has not been judicially decided but it must be correct as principle. It is laid down by Espinasse as Law. but he is not supported by authorities as is usually the case. Esp Dig 612.

22. If after an action for an escape against the Sheriff and before he has pleaded. if the judgt against the escapee is (reversed) recovered. the Sheriff may by pleading "nul. tiel record." defeat the action. this rule is collect as in that a justice for as the Plff had no right to recover vs the escapee, by the escape he has suffered no loss.

23 But if the judgt was not (reversed) recovered till after the Sheriff had pleaded he could not avail himself of it as his time of pleading had passed and judgt must go against him but for the very reason that he could not plead the reversal he may be relieved by a writ of "audita querela" 8 Co 142. Hob 207. 3 Mod 325. 8 Co 143 b. But by the more modern decisions in Eng it would seem that the practice was to admit the Defft. in such

case. to amend his pleading on motion and then plead the reversal.

24. At Com Law. a voluntary escape or escape in a forfeiture of the Office of gaoler. Salk 272. 3 Lev. 288. 3 Mod. 146.

25. At Com Law Probably in many of the States the rule, subjecting the Sheriff for escapes occasioned by the insufficiency of the prison does not hold for in Connecticut it is the duty of the county to provide a sufficient gaol and for any escaping thro' its insufficiency the Sheriff is not liable, to the rule of the Com. Law. 1 Co 84 a. Stra 482. Esp Dig 610. 1 Roll 808.

26. The Supreme Court in Connecticut some years since adopted a singular rule of decision that never subjected the County but to nominal damages viz. If the prisoner was responsible the Pff lost nothing if the prisoner was poor he could suffer no damage if he escaped 1 Root 155. 158. 275-8. 357-505.

False Return. 1st If a Sheriff make a false return, he is liable to the party injured by it, in an action on the case. as if he falsely returns process against the Defendant when in fact he has not served the Defendant's subjected. The Defendant has an action in the nature on the Sheriff for he has suffered damages from being compelled to answer a suit of which he had no notice. 1 Ship 336. Esp Dig 615.

2d So if he falsely returns "non est inventus" the Pff has an action for he is the party injured Co 8 72. 1 Stra 650. Esp Dig 616.

Of the Discharge of the Prisoner.

1st If a creditor voluntary discharges a debtor taken on execution whether he is in custody or not the act is a perpetual discharge of the debt. and the Pff can never take the debtor in any way upon the principle the maxim is

that the custody of the Deft is deemd the highest Satisfaction and the Plff when he having elected his highest remedy must abide by it. 4 Burr 2482. 7 T.R. 420. 8 id 123. 6 id 525. Burr 653.

2. And if the Plff discharge the prisoner as above in consideration of a new promise to pay the debt If the promise is broken the Plff cannot resort to the original debt for that is forever extinguished But this new promise is void illegal and may be avoided in Law. for the Plff may discharge the prisoner on what terms he pleases 4 Burr 2482. 7 T.R. 420. 6 id 525. 1 id 557. 2 East 243.

3. And thereof this obligation proves detention the Plff cannot resort to the original Claim. for it is absolutely and entirely extinguished by the discharge. 6 T.R. 525. 1 id 557.

4. If a Creditor on a discharge of his debtor taken an execution. takes a bond that the Deft shall be again returned into custody on the Execution, the bond is void as being against law. for among other reasons. he has suspended his pledge. he cannot regain it, for it is forever gone. neither will the Law subject him to Temptation to such a remedy. 1 or 2 East 243. 1 B & P. 242.

5. Such a bond was once supported in our State 2 Root 133. But it is against the Com Law.

6. If two joint debtors are taken on Execution a release of one from confinement discharges the whole debt & of course the other is entitled to be discharged Salk 574. 2 d Ray 690. Cro Car 537. 1 Vent 93.

7. It was once held in Engl that where a debtor died in prison the debt was forever discharged on the ground that the Plff had elected his highest remedy

and must abide by it. Hob 52 Co L 850. Co Jac 136. 143.

But in consequence of this rule. It was declared by Parliament that at Com Law the Pff was entitled to a new execution against the estate of the deced. 21. Jac 1st. 2 Bac 354.

8. If one of two joint debtors died in prison it was always a rule that the other was not discharged. 5 Co 86. Co L 850. Co Jac 136. 143. a 1213.

9. It is declared by Stat Hen. 8. that a penal bond given by a prisoner that he will remain a true prisoner till the debt. fees and expenses for his board are paid for. is utterly void — If it was given for the debt only it would be good but as it is given for fees & board also. The whole is void. 1 Ben 237. 1 Pow C 173. 12 Mod 683. 10 Id 159. 10 Co 100 b. 2 Mk 351.

The Sheriff has full right to take security for his fees &c. but the objection to a penal bond is. that the Sheriff's situation is such. that it might expose the prisoner (or make under his control to oppression. In Counce thing have qualified this. holding it void only for the board but under our Law I should esteem it good for the whole for a penalty cannot be levied unless the amount of the penalty is due

10. All prisoners except felons attainted are to support themselves, but a felon is deemed incapable as his whole estate is forfeited to the crown. a Stat. 1 Mod 132. Plow 68. 12 Mod 683.

11. For the Law of Conn on this subject vide Stat. 2 decision vid 1 Root 117-58. — Stat. New y 1821. 252.

Criminal Law.

Criminal Law.

1. That branch of Public Law which treats of crimes is called Criminal Law, Pleas of the Crown or Crown Law. 4 Blk 2.

2. The term Public wrongs includes all crimes and misdemeanors i.e. all violations of Public and not of private rights. 4 Blk 1.

3. A crime is an act committed, or omitted, in violation of a public law forbidding or commanding it, 4 Blk 5

4. Crimes and Misdemeanors are in the proper acceptation synonymous. But in their legal acceptation the former denotes acts of a higher and more heinous nature, the latter those of a less criminal nature, 4 Blk 5.

There is an essential difference between Crimes or misdemeanors and civil injuries. The former are always in violation of a right inherent in the public. The latter always are infractions of private rights. In almost every case a public wrong involves a civil injury but the crime is one thing and the civil injury another.

There are Public wrongs which may or may not include a private injury as a public nuisance, There are others which never include a private injury such as the offences against public law as in Eng. the exportation of wool which is a crime.

Crimes may be divided into three classes.

1st Those which do involve a civil injury.

2d Those which may involve a civil injury.

3d Those which never do involve a civil injury.

Criminal Law.

1st Where a Public Offence does occasion a civil injury, the policy of the Law gives a two fold remedy, both to the public for the crime, & redress to the injured subject for the civil injury, which he has sustained. 4 Blk. 5-7.

2 When the Offence amounts to a felony at Com Law the civil injury is merged in that of the public. If comm a subject has injuries by such high crimes can have no redress, for no action civil lies Bull N.P. 81, 4 Blk 56. 1 Hawk 283.

On this subject there has been much discussion and among the reasons assigned for it is this, that it is the policy of the Law to bring Offenders of the Public peace to justice and this might be prevented if the Offender might make the individual satisfaction and the latter being satisfied would be led backward to bring the Offender to exposure.

But I take this to be the better reason, that the Law deems not only the life of one an Offender to be forfeited to the State but also confiscates his estate to the same. hence there is nothing in the power of the criminal with which he could make a satisfaction for the private injury. Stra 873. 2 La Ray 1572. 4 Blk. 6.

But an indictment ajud by a civil suit for assault & battery lies a remedy by civil action 4 Blk. 6.

In Comm. the doctrine of Merger was always

rejected and for the claim that one crime forfeits the criminals estate.

Right of Punishment

3 The right of punishment attached to crime, is said to be founded upon the Laws of Nature and in some instances it is authorized by the Laws of God. But I can not think it necessary to resort to Natural Law, or the social compact to account for this right. It is said this right existed in full in dominio when in the State of Nature (But this by the way is not true) and when entering into Society (but there never was a period in which men did not live in society) and gave or transferred this right to a supreme power. Another opinion is that the right of punishment is derived from the consent of all the members of society either expressly or implied 4 Blk. B. Paley's Mor. & Philos? 341. Burlam 142. 4 Blk 8-9.

But I take the only true ground for society's punishing the violation of its vital interests. is "Necessity" "Necessity" or you may call it "Expediency" for whatever is expedient is agreeable to the Laws of reason and of course to that of justice. The human race was formed for civil society (and in truth this never altered) and the protection due from its supreme head and whatever is necessary for security is expedient for the Supreme head to adopt. James Gould Esq.

4 A Foreign State when regarded as in relation to the United States, a moral person, yet its rights are different from those of a natural person

And it has various different rights (but different duties

and is different in immaterial instances Vat. Instit. 7-8
Val. Max. Philos. 9-10

5. The great end of human punishment is the prevention of crimes and there is no guilt in the agent when punishment attends for a crime so circumstanced by the death of the offender the injury remains notwithstanding the execution.

6. The prevention of crimes is to be obtained in one of three ways. 1st To make the offender reform
2d To deprive him of the means of committing it again.
3d To deter others from committing the like offence. But the great object is to prevent the commission of future crimes,

Who may be capable of committing a crime and the liability

1st It is a gen. rule that all persons are liable to punishment for disobedience to laws, save those who are excepted, and for this exception there is but one reason. "Defect of will" for to constitute a crime there must be an act or omission concurred in by the will. for it is not the act it is the intent to do the act that constitutes the crime, the act or omission being evidence of the intent. But this rule does not apply to civil injuries for if A has injured the person of B. he is liable whether he does it intentionally or not. for in civil actions the law regards the injury done here the question is not what crime
ensues. 4 Blk 201 Hawk. 2.

Who are incapable of committing crimes,

The only excuse then that can save one from the penalty of a public Office is a defect of will, and this exists in three cases.

1st When there is no understanding. For one not having the understanding is no moral agent under this class are lunatics infants who in Law are not considered to act with discretion 4 Blk 22. 1 Hale 12.

2. When the Offence consists in an omission. Infants of any age are not liable, for this Offence is attributed to want of forethought, hence that cannot be imputed to an infant who can be guilty of no laches 1 Hawk P. Cr. 22 1 Blk 22.

The age of legal discretion on the Law now stands is fourteen under that age the presumption of Law is in favour of Infantcy innocence for he is not deemed doli capax. But when the age of seven the presumption of innocence is absolute. But if he can be proved doli capax, he will be held as any other person to punishment 1 Hawk 2. 4 Blk 23 Foster Cr Law. 72. 1 Hale 25-7.

But this presumption of Law cannot be admitted except in capital Offences But in misdemeanor the presumption is absolute This distinction if a true one, is an absolute one. 4 Blk 23.

3. Idiots and Lunatics cannot be punished for any act done by them during the period of their infancy an idiot can never be liable for he never had the least glimmering of reason. A Lunatic may be liable if he commits the crime in his sane. But he is not liable if committed while insane for to make it a crime in him on this principle that it is a concurrence of the will. 1 Hale 31. 4 Blk 25.

4. A Person deaf and dumb if ideas can be communicated to him by signs as if he has understanding

Law of Crimes.

may be punished 2 Hale 317. 2 Hawk 462. 4 Blk 324. 1 Mc Nal. 158
Latch. Crown Law, 106. 394

On this subject the Comments of the Eng. Law is conspicuous for
if one having committed a crime becomes insane he can
not be arraigned during his insanity and if arraigned
and before trial becomes insane the trial is postponed
and if after verdict he becomes so, judgt is suspended
if after judgt & before Execution, Execution is suspended. The
first of this insanity is found by a Jury called. "Ryan"
1 Hawk 2. 1 Hale 30 34, 370. 4 Blk 24-5, 394.

5. He who intends a madman to commit a crime is considered the principal in the act. for to be an accessary there must be a principal but that the madman cannot be. for he cannot commit a crime 1 Hawk 3, 800. 1 Blk 35.

6. But want of understanding arising from voluntary intoxication is no excuse. — Ld Coke considers it as an aggravation of the Offence. Co Lit 247. 4 Co 125. 4 Blk 256. 1 Hawk 2, 38.

But I conceive a debility of mind occasioned by a long
& habitual intoxication would excuse. for it would then be
considered as a disease. And involuntary intoxication
not only by force and I conclude will excuse

Secondly. When is a Defect of will not exercising tho it may
exist in different degrees for the will does not concur with
the act. as if a man in the exercise of a Constant act
by accident commits a crime. as if in chopping wood
the ax flies from the helve and kills one standing by. 4 Blk
26. 1 Hawk 58. 4 Co 124. Keeling 123. But Ld Keeling
been engaged in an unlawful act and the like accident
had occurred he would not be excused. for he has the mens rea
1 Hale 39. 4 Blk. 27.

Who are capable of committing crimes?

1. Ignorance or mistake in point of fact may excuse, for the will does not concur. But a mistake in point of law will excuse no one. For "Ignorantia juris neminem non excusat." Kay 467-8. 1 Bur 35. 4 Blk. 27. Co Cas 558. 3 T.R. 514. 4 Bur 35.

2. Third When the act is done thro' necessity this offence is excused. When a feme covert is encouraged by an unlawful act for she is supposed to act by the coercion of the husband, as if she does certain acts in his company she is excused and the cases excepted are theft, Burglary and arson. 10 Mod 63. Keling 31. 3 T. 1 Hale 45-7. 4 Blk 28

3. But if she commits them when in the husband absence, & by his command in his absence, she is not excused 9 Co 71. 4 Blk 28-9, 236. 244.

4. Even the actual coercion of the husband, in cases of Treason murder & Robery will not excuse. 1 Hawk 2. Keling 31. 1 Hale 47. 4 Blk. 29. The reason of this distinction is very unsatisfactory. It is said she is excused in the former cases, because they are acts "mala prohibita" and condemned in the latter because, "mala in se" But are not the former "mala in se" This reason seems to have been invented to what some reason might be given. But I take the true distinction I think appears. It is said to have arisen out of the ancient law of the Benefit of the clergy, for this benefit did not extend to the latter crimes and it never was extended to women but to men only: it was in the former cases if the husband & wife joined. The former by consenting in the threats would be set at liberty so that this strange consequence would follow, to put the husband who is deemed the principal would be set free & the wife condemned to suffer even tho' she acted under the coercion of her husband, the whole consequence

of the crime. To avoid this the law determines that in such Cases the Mind be excused altogether.

11. But neither a Child a Servant or such are excused for a crime committed by the command of the Parent or master. It may however participate the enormity of the act 4 Blk. 28-9. 1 Hawk. 3 Hobbs 34. 1 Hale 44.

12. Another Species of compulsion called "duress per minas" may excuse, as if a man commits a crime under the threats & death &c 4 Blk 30. 1 Hawk 40 1 Hawk 5. This rule holds however in positive Offences for in crimes "Mala in se" he does not stand excused. as if A by threats is compelled to kill B to save his own life. he would be guilty. But this might recommend him to the mercy of government.

13. Legal Compulsion is an excuse, as when a peace Officer is suppressing a riot occasions the death of an Offender still the Hand is not at the door of the Gaol but at that of the Victor. Hale 53. 4 Blk. 31.

14. Stealing to relieve oneself from extreme Hunger (viz.) or nakedness is neither pleaded nor excused by Law. Hawkins thinks that the necessity justifying the means will not Hale 4 Bac 31. 1 Hale 54.

Principal and Accessory

1st. You distinguish between the different kinds of guilt the Law makes a distinction between a principal and accessory.

2 One may be a principal in an Offence in two degrees. First, is he who actually perpetrates the crime in person This is called a principle in the first degree 2d He who

is present aiding and abetting not actually assisting with his own hand. he is not of the first but of the second degree only 1 Hale 615. Dong 197. 4 Blk. 34.

This distinction is of but little consequence as to the penal consequences, except so far as discretion is made by Statute Law. Indeed some authorities make no distinction between principal and accessory 2 Hawk 441. 258. 356. But this is now Law. 2 McNal 523-7-8. 4 Ban 2075.

3. A principal in the second degree is one present aiding and abetting but such presence does not alone consist in his standing by in sight or hearing of the one who perpetrates the act, for a constructive presence is sufficient as if a while B perpetrates the deed stands off and keeps watch, then A is a principal in the 2 degree. Foster 350. 2 McNac Nal. 539. 4 Blk 34. Thus rules hold alike in Stat felonies as felonies at C Law. 1 & 2 McNal 528.

And there are some cases in which a constructive presence is not necessary to make one a principal in either degree, as in the case of Murder by poison as where one kills another by setting a trap or gun, if one should let loose a wild beast by which another is killed. In such circumstances the party must be guilty of the crime in the first degree or not at all, for he cannot be guilty in the second degree for that supposes no guilt in the first degree. & if he is not the first no one can be. Hobbs 52. Foster 356. 4 Blk 34-5. 4 Co 44. 9 Co 81.

Law of Crimes.

1. An accessory is one who is neither the actual perpetrator nor present at the time of perpetration either actually or by construction, but one who is concerned in the act some way either before or after the act.

2. All officers accessory & accessories as that of high treason. The activity of this crime is to grant that all concerned are deemed principals, even to the actual thought of this crime without any overt act to perpetrate the intent, under pain of felony. 2 Hawk 439-46 12 Co. 81-2. 4 Bl Ab. 35. Whatever will make an accessory in felony will make one principal in treason when any who is any way concerned, in a treason as he should be absent at the time of committing it, he is guilty as a principal 1 Hawk 58. 2 Ld. 439-40. 4 Bl Ab 35

3 But in petit treason murder & other felonies (except in such as the law deems to be committed, petit larceny, without premeditation,) there can be accessory after the fact only there may be accessory But in petit larceny and all crimes under felony there are no accessories the reason is, that the law will not undertake to distinguish nice between the smaller shades of criminality 4 Bl Ab 36. 191 12 Co. 81.

Shelly speaking it is only in felonies that there can be accessories.

4. The guilt of an accessory is always graduated by that of his principal. If a servant murder his master he is guilty of felony being an aggravated theft of crime but had he procured A to do it he would be an accessory in murder only for this is the crime of A.

Of an accessory before the fact.

to make
for him an accessory in felony would be making
him more criminal than his principal. For
had the Servant been present at the time & comm.
-itted the murder of the Master, he could have
been guilty of felony and A of murder for there may
be different degrees of guilt among actors in a
Criminal act. 1 Hawk 132. 2 Ld 445. 4 Blk. 36, 1 Hale 615

Accessories are of two descriptions
1st Those before the fact 2d Those after the fact

An accessory before the fact is one who procures
counsels, or commands the act but is absent
at the time of its commission. 1 Hale 615. 2 Hawk 445
4 Blk. 36. And he who acts an incomplete act
is accessory to all that commission does not command
act but not to one separate from it or to an act
not directly arising from it. As procures B to strike
C & C strikes him till he kills him here A is acc-
-essory in murder. For this arises from the direct
consequence of the beating. But if A abet B.
to burn a House and C. robs it or kills a person. A is
not accessory to the robbery or murder, but only in the
case of arson. 4 Blk 37, 2 McNal 537, Forst 370. 2 Hawk. 4407.

2. To Solicit one to commit a crime is of it self
a misdemeanor, (at Com Law) thus the crime solicited to
be done is not committed, for its tendency is dangerous.
2 Ent 5, 3 Ld 581, 2 Ld Raym 1377 2 Mod 112.

3 If one having abetted a crime retracts before
it commission he is not an accessory but takes the
locus penitentia the Com Law) from this principle it is
common that men may retract & not themselves
commit 2 Hawk 445. Forst 351. 1 Hale 537.

4. The Com Law rules apply to Stat Felonies tho the Stat may be silent on this head. for a Stat Felony has all the incidents of a felony at Com Law. 1 Hawk 164, Lead Ca Law. 64. ...

5. The bare concealing of an intended felony does not amount as accessory if the felony need be committed, but it is a misprision which is a Com Law felony and punished by imprisonment. 2 Hawk 447. 1 Hale PC. 4 Blk 121.

6. Persons who are actually present when a felony is committed and do not endeavour to prevent or apprehend the felons are guilty of a kind misdemeanor. This is an offence of misprision. Even if the present cannot be guilty for no latches can be imputed to an infant. 2 Hawk 442, 15, 16. Nog 50. But I conceive this rule means a diligent endeavour and does not require men to expose their lives to prevent a felony & apprehend a felon.

1. Accessory after the fact is one who relieves, comforts, and assists a felon knowing him to be such. The assistance must be with intent to conceal the felon. &c to exempt him from justice 4 Blk 38.

(But this rule is not intended to prevent men from relieving wives when the common offices of humanity

2. Buying & receiving stolen goods knowing them to be stolen did not at C Law make one an accessory 5 Hen 84. Lev 2. 2 Hawk 540. Ro E. 88. Yelv 405. 1 Hale 620. 2 Hen 450 Stat of Com. makes them principals.

3. If it happens to continue an accessory after the fact, that the felony be actually committed at the time of the assistance given, As if A. mortally wounds B. the event of whether or not it was committed for this depend on the death of

B. commits by the command and until this event the wounding is a misdemeanor. So if C. afterwards & to escape before B's death, he is not accessory to the murder. for the wound then was not as yet committed to belong. 2 Hawk 451. 1 Hale 219. 622. 4 Blk. 38.

4. A feme covert is excused in assisting her husband who has committed felony. for she is supposed to act under the command of her lawful

5. But a servant or child is not excused in assisting & a comers. Master is the husband excused in assisting his wife. 2 Hawk 451. 4 Blk. 38. 9.

6. If one is indicted as accessory to two principals proof of his being accessory to one is sufficient to support the indictment. 9 Co 119. a. 2 McNally 540-2.

7. It is a general rule of the Com Law. that accessories & the same punishment with their principles But in most cases by Eng. Stat. accessories after the fact are allowed the benefit of the clergy. 4 Blk 39.

8. It was once a rule that no accessory could be compelled to plead until the principal had been arraigned, convicted & sentenced or attainted This at this day is not the rule and he may be compelled to answer before the principal is attainted, but cannot be tried unless he consents until after attainder of the principal at least where a different rule is established by Stat Law. 1 Hawk 328. Hawk 453. 56. By Stat 1 Anne 12 § 9 & 10 Wm. 3 c. 11 whether the principal is attainted or not. he is not tried as accessory but as the felony as per Stat. 2 Hawk 453. 4 Blk. 323-4. Latt 64 & 1 Ann 353.

The reason why he cannot be tried before the principal is that his guilt is relative, and the fact whether there is a principal can only be examined by verdict: and if the principal is acquitted the accessory is discharged: And if the attainder against the principal is reversed that against the accessory is also reversed. 2 Co 119. 2 Hawk. 452-3. Roll. 77.

4. But the death or pardon of the principal after attainder will not annul the accessory even at Com Law. for neither of them annuls or purges his guilt 2 Hawk 453. 4 Co 45 Ro Ab 541. Roy 417.

10. But by the rules of the Com Law. the death or pardon of the principal before attainder the after conviction and discharge the accessory. The reason is that a verdict without judgt is no evidence of the fact found by it, and the reason of this is that the Party must always have leave to show cause against the verdict that he may have a new trial and this holds in civil cases, here such verdict cannot be given in either against the accessory for it does not appear that there was a felony 4 Blk. 328. 2 Hawk 453

This rule is directly changed by Stat Anne 2 Hawk 453.

11. If an accessory either before or after the fact is acquitted. such acquittal does not preclude his being prosecuted & convicted as a principal for the fact if his acquittal is no evidence that he is not a principal nor to support the Bill the same evidence is not required to support the Latter. Foster 361. 2 Hawk 529.-30. 1 Hale 625. 4 Blk. 46, 2 Ld Raym 496.

12. On indictments against the accessory, need not state that the principal committed the fact it is enough to state that the principal was convicted 1 Hale 625. 4 Bl. Com 34 Foster 365. 2 Y. C. 465.

13. That the accessory on his trial may deny the guilt of his principal, either in point of fact or law for the record of the conviction is conclusive only as to the fact of conviction but conclusive evidence against the accessory. If convict an accessory it is enough that there should be a principal, But that there was such a principal he may in his defence deny 4 Bl. Com 324 Foster 121. 365. 9 C. 118. 2 Hawk 456.

14. The rule is the same with the principal plead guilty in he cannot complain in appeal against either and when both are on trial, the accessory may contend with his own & his principals crime. 2 Hale Hist 463-4.

Felony

1. Any Offence at Com Law which works a forfeiture of goods & lands or both is called a felony the term "Felony" is general i.e. it does not designate any particular offence but embraces all crimes which occasion this forfeiture 4 Bl. Com 94.5.

The word original, denoted "no crime" but from the same consequence of certain crimes it was used a synonymous with the word "forfeiture of a fief" after words it was used as the name of the offence occasioning such forfeiture and by natural consequence it was used to express any forfeiture of goods and lands 4 Bl. Com 96-7

2. Murder Manslaughter & Treason is a felony because it works a forfeiture and formerly was within the terms but in modern times it is declared by statute and thus by general usage and the word now extend a crime by itself yet it is often used as synonymous with "felony" 4 Blk 94-5. 98. 1 Hawk. 99.

3. It is observable that capital offence are not consequent of felony tho in most cases it is annexed. 4 Blk 237. 1 Hawk. 146. 2 Mis 19. 1 McNally 208.-9.

4. Then are now felonies which incur capital punishment, as Homicide by chance medley

5. Then are also some capital offences, which do not incur a forfeiture of goods and chattels as standing mute on an arraignment 1 Plow 99. 4 Bl. 95-7.

6. All felonies which are punishable with death at the Com Law, work a forfeiture of all the offenders lands in fee simple and his goods & chattels and these only 4 Blk 87, 381.-5, Co Lit 391.

But the word "felony" by general usage imports all capital crimes, tho' treason, & by Stat a new crime is declared a felony it implies that it shall be punished with death, & forfeiture &c if by an Ordinance it accurs a capital punishment. The General called a felony this in modern times the word felony has changed its meaning 4 Blk 98. 1 Hawk 168. Hob 293. Coke 391.

7. If a Stat at this day forbids an act under pain of forfeiture such Crime is only called a misdemeanor Hob 270. 1 Hawk 168. Co Lit 391 and this became so

Peace must be considered to be a felony from Malice and ambigum Aforethought

1. All crimes which at Common Law work a forfeiture are called in this State by the term main the they work no forfeiture, for in this State there is no forfeiture.

1. Of the Benefit of Clergy some felony are entitled and others are not. Benefit of clergy is a species of pardon, excepting (some crimes of certain crimes) from the punishment of death. It is sometimes called a Statute pardon. But it does not exempt the Offender from the forfeiture annexed to the Offence 4 Bl. 367. 333. 1 McNal 213. 4 Bl. 387.

For the origin of the Benefit of clergy see 4 Blackstone (58 and onwards) 365 and onwards, to 372.

2. The Benefit was allowed in petit treason and in almost all capital Offences. But not in all for in high treason it was never allowed neither was it in a mere misdemeanor. For the punishment of it is not capital. 2 Hawk 478. 4 Bl. 366

3/4 This Benefit was first introduced in the 25 Open of the reign of Edw 3d. before this Person it was allowed by the Com Law. Since the time of Edw 3d. It has been called a Stat pardon. 2 Hawk 497.

3. This benefit was first extended only to the Clergy. afterwards to any man who could read. But not to women who could read for they could not enter into holy orders. and the reason why this was extended to any man was that the Priests were in Latin. Therefore if one could read a verse he was allowed a Clerk in holy orders tho he could

this allowd Commence. That a man convicted for any offence might formerly have pleaded it by a Burning on the Thumb which a woman for the same offence would have suffer'd capitally. It was held that it was Law then when the Wife committed a felony in the Company of her Husband, the Husband be deemd to act through the Coercion of the Husband and of Course held not discharged from liability 2 Hale 372 4 Blk 385-7. 2 Hawk 474

But now by Stat the benefit of the Clergy is extended to all persons Male and Female 4 Blk 367-70.

4th Common persons taking this benefit are burnt in the Hand which imprisonment is punished in some other way But Clerks in Holy Orders and Peers of the realm could take the benefit without any imprisonment 1 McNally 214-19. 4 Blk 373. Forte 356. The benefit of the clergy is the Stat Burden we must take it.

Laymen are entitled to this benefit but once but peers in Holy Orders are allowd it as often as they commit a clergyable felony 4 Blk 373. 1 McNally 214. 2 Hale 373.

5. By reading the Book for any particular felony, the person is discharged from any and all clergyable felonies which he might have committed for it appears as a record in civil matters. 1 McNally 217. 4 Blk 374

6. In Eng this benefit is allowed in all felonies both by Stat & Com Law unless expressly taken away by Stat. So that in every case the question is what felonies are not and what are entitled, and the onus probandi lies on him who insists the right to take it 2 Hale P. C. 330. 4 Blk 373.

This practice was formerly pleaded formerly but for ages past it has been allowed on motion after verdict of guilty and been attainder 2 Hale 236. 4 Blk 332.

7th In no one of the U.S. is the benefit of Clergy allowed to Men to us it is seen a matter of curiosity than use

Particular Offences.

and first of.

Homicide.

1st Homicide is the killing of any human being, of this there are three kinds 1st Justifiable 2d Excusable. 3d Felonious 4 Blk 177. 1 Hawk 104. 111-115.

2d It follows that Homicide is not necessarily criminal The 1st class has no degree of legal guilt attached to it for it is justified by the Law. The 2d has some guilt but its punishment if any is nominal Foster 283. 3 Hawk 89. 1 do 188-9. 4 Blk. 17. 189.

1st Justifiable Homicide is of several kinds. 1st when occasioned by necessity. as If a Sheriff who executes a malefactor pursuant to a sentence of a Court of Justice then he takes the life of a human being but he is no criminal by the Law. 1 Hawk 105. 4 Blk. 178.

But the Sheriffs only justification is the command of the Law. Therefore he cannot plead as ace and no more than he is enjoined to do by a Court having competent jurisdiction and the act must be done

by Statute for it is done by a third person but
this person is guilty of murder. It is then that the
Sheriff generally officiates a person commonly called
a Hangman. But that person must be the only person
for the purpose and then quoad the act he is a ministe-
1 Hale 497. 501. 1 Hawk 106. 4 Bl 178.

2. An Officer executing a sentence of death must pur-
sue the sentence strictly or he will be guilty of murder
as if a stranger were to do it. Hence if the Executioner
the Executioner is guilty of murder 2 MacNally 559. 4 Bl
179. 1 Hawk 106. 1 Hale 501.

And it is essential for the Officer's justification
that the Court pronouncing the sentence has compet-
ent jurisdiction of the subject matter for if the Court of Ba
mere pretends to pass sentence of death and the Sheriff should ex-
ecute the sentence both the Ct. & Officer are guilty
of felony 10 Co 76 B. 5 id 106. Cro Car. 98.

3 But if a Court have competent jurisdiction
but in pass sentence contrary to Law & evidence yet
the Sheriff is justified in carrying that sentence into exe-
cution 1 Hawk 106.

2. 2d Homicide is also justified when committed
for the advancement of public justice as if a Sheriff in ar-
resting a person (even in a civil suit) takes his life when
he cannot arrest him otherwise the Sheriff is justified
so if an officer in attempting to suppress a riot, is unable
to do so otherwise taking the life of some one he is justified
in so doing 2 MacNally 559. 570. 4 Co. 68. 1 Hawk 106-7. 4 Bl
179.

3 If an atrocious felon resists or flies from his pursuers
even a private person may kill him if he cannot

is arrested without, this is not founded in any right in the individual, but on a public right which the public allows individuals to use in common cases, 1 Hawk 106 2 McNally 559. Foster 271.

4. And if an innocent person is indicted for a felony if he make resistance that he cannot be taken without taking his life he may be killed

5. If a private person kills in attempting to arrest for a felony, he does it at his peril unless he has a warrant for if he does not act under a warrant his justification depends upon the crime of felony standing established against him whom he killed in attempting to arrest. Foster 18. 2 McNally 572.

6. When ever an officer attempts to execute lawful process or mesne or other civil or criminal whether of great or small importance if he is resisted he is justified in taking life. If he cannot execute the process or mesne the arrest without. Let the Sheriff is in no fault for acts in subjection to the command of Law. 1 Hawk 107. Foster 270. 293-4. 2 McNally 565.

3 Oct. 8th. Homicide to prevent a felonious crime is justifiable as if one attempts to murder another and is killed by the person whom he attacks.

1. If one attempts to break open a House in the night (the rule is the same in an attempt to burn) and is killed in the attempt the slayer shall be justified But this does not extend to crimes committed without force, as picking one's pocket, or the breaking open one's door in the day time unless some one be there in the day time, unless some one be there in the attempt to rob. 1 Hawk 108-9. 2 McNally 582. 4 Bl. 180-1. Foster 271-5. Keling 37.

Law of Crimes

4. 4th It is a general rule that Homicide committed in the defence of Life, goods & person from Trespass is not punishable in the least Degree. 1 Hawk 108-9.

5. If we take life by accident, Negligence or Inadvertency the offence is unjustifiable. Such as if an Officer in attempting to break the outer door of a mansion House, is killed by the owner. 1 Hawk 108. n 1108.

When a Felon in Gaol endeavours & attempts to be enlarged & escapes by force. & may lawfully be killed as a woman may kill one attempting her Honour and so may any other person. Foster 274. Hawk 108-10. 4 Bl 180.

6. For the other species of justifiable Homicide may be specially pleaded. But at this day it cannot be given in evidence under the general Issue. Hawk 105. 1 Hale 478.

2d Excusable Homicide

1st. When a person slays another in Self-defence, that Justification stands singular and this is granted. But it is by Letters Patents and Commonly that the Crown is from the Guilt of Felony 4 Bl. 186

Ex. Homicide is of two kinds. 1st By Misadventure. 2d In Self-defence

The 1st is purely involuntary, and it must be strictly so. else it does not take. This denomination

2d is in Self defence under such circumstances as will excuse but not justify. 1 Hawk 111. 1 Hale Bk. 41. 483 492.

1st Where one doing a lawful act without design to

commit a crime accidentally kills another, he is excused but not justified. But to make Homicide of this description excusable it is indispensable that it not be unlawful

2 When is a Misfortune in the Books which is an excuse. If in Hunting a thief a Horse which Bites kicks the horse runs & kills B. is said to be guilty only of Homicide. I should suppose that the Hunter could not be charged with Homicide in this case. But it certainly would be guilty of manslaughter if nothing more. 1 Hawk III. Note 25, 89, 1 Kel 182, 3 Keb 40-1.

3. Upon the principle of this punishable crime, if a patient in Insanity attacking his Child by accident kills him, it would be a Misfortune Insanity changes this nature. So Lunatics & Idiots. Keb 645 Foster 262 2 McNally 556-7. 1 Hawk III. 1 Kel 182.

4. On the same principle an officer in arresting a Malefactor death accidentally ensues but it never when that he used no unnecessary rigour or outrage and he arrested for this excuse from and no otherwise but when necessary for the purpose. Keling 64-5. 1 Hawk III. 2 McNally 556-7. & 566-7.

5. But if death ensues from an unlawful act it will be manslaughter at least (unless malice) as the case may be. 2 McNally 553-4.

6. If the unlawful act causing death, be felonious the Homicide is murder. But if the act only was felonious the Homicide will be manslaughter Hob 134. 1 Hawk 112-13. 4 Bl 183. 192 Fin 198. Keling 107.

7 But if one deliberately intends to injure person and accidentally kills him he is guilty of murder, and it is generally true if death ensues from an unlawful act which tends to endanger life he is guilty of murder, 1 Hawk 112, Kelyng 117, 113-14, 4 Bl. 193 200-1.

8 So if one does an act which must endanger the life of a particular person and by accident kills him, he is guilty of manslaughter at least, for in fact it is unlawful and the intention is to endanger at least, and he who puts the hazard wrongfully of another in danger must abide the consequences 1 Hen 481. Foster 261, 1 Hawk 112, 4 Bl. 183

9 But if death happens in consequence of any simple battery the offence is from misadventure, or chance medley, bringing Bate &c. 2 Wheatly 234. Foster 260. 1 Hawk 112.

10 So if a man kill another, his intention being only to disable or hurt him, he is guilty of murder. For it is called homicide in self defence and is excusable. 4 Bl. 183 4. 3 Bac 677.

2. Bacon says it is murder who gives the fatal blow. this by the way is an opinion not to be followed.

3. But to excuse, the danger must be imminent to take the assailants life to save his own. but the latter will if this will the addition &c. or to use his utmost force to beat back. 1 Hawk 113, Kelyng 128, 4 Bl. 184 5. Foster 273. 2 Wheatly 563, n. 503

4. When one takes life to prevent his own it is not to justifiable homicide, but in some cases it is said to extenuate which it would be in the assailant was killed to prevent the commission of any crime or in self defence 4 Bl. 183

5. It is sometimes difficult to distinguish between Homicide in self-defence and manslaughter. The distinction is, that if two are fighting and are struggling for the mastery when the mortal blow is given, it is Manslaughter.

6. But if one who having withdrawn in the affray or having first declined the combat, but with a real fear that to save his life or prevent great danger he takes the life of his antagonist, it is Excusable Homicide. Foster 277, 1 Hale 481, 4 Bac 184.

7. When one assaults another he does it at his peril and if he takes life just to save his own it will be manslaughter at least. 1 Hawk 113 Reading 58, 61, Foster 276 this distinction is Bacon perhaps,

8. And it has been said that if A. maliciously assaults B. and having struck him flies and then to decline the combat, but is so pressed by B that to save his own life he kills him, he is guilty of manslaughter, this is a dangerous rule, but it is founded in the Books of the Law. Hawk 113, 123. Reading 58, 108 g.

9. If two agree to fight, as by the rule above, and one being so pressed that to save his own life he kills his adversary he is guilty of murder because of premeditated and concerted design, 4 Bac 185. Reading 129, 131, 117, 1 Hawk 125-6, 112

10 The blood of him who kills in duel is a murder in the Deodand, and according to the opinion of some the blood of the Party killed is likewise guilty equally, But I take the better opinion to be that he is not, 4 Bac 199, 1 Hale 443, 1 Hawk 124.

11 This rule of self defence is extended to all the domestic relations as a husband, parent, and master in taking life in the defence of his wife child

a warrant and a commission. 4 Blk. 186. 1 Hale 486. Hawk 125. Kel 61. ✠

12. If Person indicted of Treason commit the Treason by means of his misadventure or self defence, but must give it in evidence to the Jury. The reason is that it is their reason that constitutes the Crime 1 Hale 478. 2 Lil 283. 1 Hawk 105. 115.

✠ If a Def. against (against) whom an Office has issued & attempt made to arrest the Def. is not arrested upon the Process it is Illegal & Illegal men punished it was Attempt good upon the Law of it. For the Office is bound to execute according to the Order of Law and Arrest justified and if justified the Def. cannot be rescued. 2 McNally 188–9. 561. 7 T.R. 455

13. Excuable is said by La Coke to have been punished not dealt, But now he says that is pardoned and a Petition of good behaviour entered in Star 4 Blk 188. 1 Hawk 114. 2 Inst 282

14. The punishment when attempts to commit Treason & misdemeanors either in whole or in part. If in the it could be felony & this Bk. has expressly been in case. 4 Blk 188. 1 Hawk 115. But at this day it is not closed with Felonies. For all are capital at this day all felonies are called.

15. As for such as the Engl. were and Treasons of this kind have always been pardoned and their good Lands & Estates and at this day the Judges direct the Jury to find Guilty. 4 Blk. 188. 98. Hawk 538-9.

16. The Assault Treason when committed to the person whose it is not felonious. Yet 3 Blk and Coke say that it is felony. But it is entirely no Crime and then can be no attempt &c. 2 Hawk 447.

1 Hale 615-16.

" 3a Felonious Homicide, 1st This is the killing of a human being without justification or excuse and it may commit in killing oneself. 1 Hawk 102. 4 Blk 188.

2. Homicide by killing oneself is called "felo de se" in technical language the offence is called "suicide" and the offender a suicide, Si sibi.

3 A felo-de-se is one who deliberately puts an end to his existence or commits some unlawful act the consequence of which is his death, as if A in doing a thing to kill B. is killed himself by the bursting of the gun he is a felo-de-se. 1 Hale 413. 1 Hawk 82-3.

4. If A request B to kill him and B is done A is not a felo de se, but B is a murderer. The reason assigned is that A's request was void. A cannot do what A is not able to do. 1 Hawk, 103

5. But to the guilt of suicide must be of the age of discretion and compos mentis, this is a requisite which obtains in all cases 1 Hale 412, 1 Hawk 102, 4 Blk. 189-90.

6 Accessaries & abettors are punishable before the principal 4 Blk 189. for the punishment of this crime vide 1 Hawk 108.4 Blk 190. 3 Inst. Coke 54 Raymond. Dorr 524 The punishment was never enforced into this country.

2. Killing Another and this is either with a sudden malice afore thought hence a felonious killing another is either manslaughter or murder 4 Blk 190-1. 1 Hawk 115 4 Blk 198-9.

The word Malice is used both in the civil

Manslaughter and any attempt to do it is not any more malignancy with any design as here 256.

Manslaughter is of two kinds Voluntary or Involuntary, both of them admit malice before the fact 1 Hawk 115 & 31ch 191.

Voluntary, is done on a sudden, two fights and in the heat of the passion the intentional kills the man & is manslaughter only. This word sudden is expounded in an ancient act of parliament to kill upon the instant of killing that can be a witness to kill, yet it was not premeditated. 4 Bl 191 Ho 29. Keel 115. 134-5. 2 Wallg 563-8.

But it is said that if in all previous appearances, death ensues it is murder. Hawk 112 22. Kel 56. 131.

2. If one is attempting to separate two who are quarrelling & killed & they gave previous notice of his intention that they were only to separate them it is only manslaughter. But others say it is not for the party might suppose him to be taking side. Kel 66. 7. 114-15. 4 Co. 81. 2 Wheat 561. Ho 316 342.

3. If one is highly provoked by an indignity offered by another that he immediately kills him it is manslaughter only. Keeling 125 2. 1 Hawk. 125. 11th Foster 470. 4 Bl 191.

4. But if there has been a sufficient time after the affray for the passion to cool before the crime was committed it would be murder, for then the blood is not cooled

act of parliament Hob 294. b. Jay 212. Cro Eliz 158. + Bulk 196.

5. But in this rule of the killing was immediately following the insult, yet if the offended party meant to take a deliberate vile to kill in the great heat of blood taken, the homicide is murder 1 Hawk 126. Cro Car 131. Keel 17. Hob 292. 2 Mod 161 at 564.

6. Sure words are no sufficient to reduce a sudden killing to manslaughter provided the beating was violent & the killing voluntary, the same rule holds when the provocation was done of purpose 1 Hawk 126. Keb 130, 131, 235, 2 Roll 290. Mo 564 - 7. Cro E 779.

7. But under either of these words it is always likely from the manner of beating that the party intended only to chastise, the killing is reduced to manslaughter. 1 Hawk 124-5. Ro 291. + Bl 200. 2 Mod 561.

8. So upon a sudden affray between A & B. the friends & relations of A & B. if in any manslaughter for their interposition being sudden occasioned by the instant that it proceeded to be an actual fighting but this rule is to be qualified 12 Co 87. Keel 136 Hob. 315.

9. Manslaughter is a sudden premeditated killing done in a sudden heat arising from defendants own fault but in the latter case is an appearance wanting for the premeditated stroke, the agency, but in the former the want mistaken is excused, but is an evil & sudden revenge. 4 Bl Co 192, 184.

Law of Crimes.

Of Involuntary Manslaughter.

This is the term applied to all homicides but murder & certain excusable act which is unlawful. 2 McCord 553. Ho 261. 298. 4 Bibb 192.

This differs from "Excusable homicide", in that the latter goes from some lawful act. the former from some unlawful act. Cooke 830. 4 Bibb 192.

2. The unlawful act must be one "malum in se" but if it is one "malum prohibitum", the consequences that may ensue are the same as if the act was lawful. As if one while hunting by accident kill a man with his gun without having any malice, this is only a casualty, but if he was in pursuit of an unlawful act, 2 McCord 553-4, Hut 25. 1 Hawk 473.

3. If an accidental death ensue while engaged in any sport, play, or dangerous, & unlawful, the homicide is manslaughter. as in fencing &c. 4 Bibb 183. 192. Hut 134. Hawk 112. Ho 261-292.

4 The rule is the same when death accidentally comes from an act lawful in itself provided it is done in an unlawful manner. for if to all the circumstances of the case the act is unlawful. Tho an act lawful in the abstract may become unlawful from the manner in which it is done. Bibb 192. Reed 40 1 Haw 112. Hut 481. McCord 556 & 58. Ho 263 2. 92.

5. But in this species of homicide the ingredient is to be observed. If the unlawful act is but a misdemeanor the homicide is manslaughter. But if the unlawful act is itself a felony the homicide will be murder, unless it may be accidental. 4 Bibb 192-3. 1 Haw 126 & Reed 111-17. Ho 257. 292. 9 Co 91.

Murder.

1. The definition given by Ld Coke whom all follow. " "When a person of sound memory & discretion unlawfully killeth any reasonable creature in being & under the peace with malice aforethought either expressed or implied." 4 Bl Ch 195 1 Hawk 116.

2. The difference between manslaughter & murder is that the former is an act of sudden passion whilst the latter proceeds from wilfulness & Malice

We must examine to these this definition & to follow Ld Coke definition.

1st He must be of "sound mind" but this is not necessarily applicable here for it applies in all the offences 4 Bl Ch 20, 25.

2. "Unlawfully kills another" The killing must be unlawful. Hence if a killing without warrant, a person it requires an actual homicide. Hence an unsuccessful attempt to kill is not murder. The former is imagined to. But such an act now is regarded as high misdemeanour, next to felony as a crime, 4 Bl Ch 196.

2d The other must be killing it is not implied that the taking of life should be founded & direct. Any act the probable consequence of which is death and the ultimate consequence is death. If done by party deliberate intent is murder, provided the act was unlawful Hence one may be guilty murder by inducing to commit a dangerous. 4 Bl Ch 196, 1 Hawk 118. Stra 484.

3. The murder is perpetrated by those circumstances and in acts commanded by the Law vide 1 Hawk 118. 4 Bl 177. 1 Hale 431. Fitz 856. 883. 1 Hawk 119. Salk 1. 1578. 1 Salk 631.

1. One may in certain instances be guilty of principal where the act is perpetrated by another. Thus if A watches a madman to kill B, to whom an access is stopped upon a pretence that the madman cannot be punished, for he is incapable of committing a crime 9 Co 81. 1 Hawk 3. 11th Keling 53.

2. If one maliciously procures a third person by whom crime, the commission of which is murder. He is guilty of murder. Fost 132. 4 Bl 196-7. But it seems he cannot be so considered in Law. For in legal contemplation accessorial is not by the but by operation of Law.

3. If a Physician gives a patient to a patient to cure him, but it happens to kill him, it is homicide by misadventure. But it is said that if the gentleman of the saddle says and sees a gentle he could not be thus excused but would be guilty of manslaughter at least if not of murder. 4 Bl 197. 1 Hawk 13th 1 Hale 430.

4th So all those are circumstances when the death is not immediate but in consequence of the wound or injury. But death must happen within a year and a day from the time of receiving that wound or injury and in this computation the day of the injury is reckoned. This limitation is merely arbitrary. But it is useful that some time should be fixed, beyond which the civil duty should cease and the punishment is no more as a

4 Bl 197.

1. If the party injured dies of the wound a injury within the time. It is no excuse in the mouth of the Offender that the injured party would have lived had he received proper attention. 1 Hawk 1. 9 Keeling 26 Vol 17, 1 Hawk 428.

2. If a person is indicted for killing in one mode and is proved to have killed in another, the evidence will not support the dec. as if he is charged in the dec with killing with a Ball but is proved to have killed by poison

3. But when the dec and facts differ only in point of mere circumstance, the evidence will support the dec. As if he is charged with "killing with an ax" & it is proved to have been done with a scythe, the substance of the charge is the giving of the wound and the circumstance establishes it. The person whom a wound is given dies within the year & a day is considered 2 Hawk 185. 2 McNal 520. 9 Co 67. 4 Blk 196.

4 If two or more persons are charged with murder & as auxiliary and Burglarious that it is proved that A gave the blow, and B was present, this can make no difference for the act of one is the act of both. 9 Co 87, 112, 4 Co 422. McNal 526. 539

(4th Vol) 3d "All unlawful exertion of bodily force under the pretence," as it reports "under the pretence" blows & outrages are within the description, and the killing of any person, except in self defence or by law, is a violation of this part of the description, 4 Blk 177-8. 1 Hawk 121. 1 Hale 433.

1st 2d The killing of an infant in "ventre sa mere" is not within the description but it is a great misdemeanor an offence next to felony. The an infant in ventre sa mere,

3

Law of Crimes

is in the [illegible] many instances yet it is not so this 1 Hawk 121. 4 Blk. 198. Vide Hawk 86. 4 Blk 199. Kelyng 71. who dissent from this opinion. But if an injury be done a child and the child receive a wound or injury become while it is in the womb if it is doubted whether the offender is guilty of murder or not, But I take the better opinion to be that he is, but the child must die within a year and a day after receiving the injury for what it dies 4 Blk 197 S. 1 Hawk 121. Contra Lake 123.

4th Of a "reasonable creature" The epithet seems to be synonymous with the word "living creature" But by it is meant a human being. Killing a madman, an idiot, a lunatic, or drowning a madman is murder. So it is murder to murder a child and this whether the committer knew it was a child 1 Hawk 113. 1 Hale 431. 436.

1. By st. Conneils B. to kill (to kill) an infant in the womb and in consequence of that dies after the child receives a stroke of which he dies after birth is murder 1 Hawk 121. as anciently held 1 Hale 118. 127. 1 Hale 431. 436. 1 Hawk 126.

2. By Stat 21st James. If the mother of a bastard child secretly it be concealed dead, she shall be guilty of murder, unless she can prove by one witness that it was born alive 1 Hawk 121. 2 McNal 581.

This has made the fact prima facie evidence for the jury from whom it is left it as equivocal circumstance whether that the child was born alive this is always left to the determination of the Court. But if there was no evidence no jury would convict on Coroners inquisition 4 Blk 198. Hale 322. Hawk 119. McNal 582.

Murder.

5th "with malice aforethought express or implied" called "malice prepense"

1. This is the grand criterion that distinguishes murder from every other kind of homicide

The word "malice" does not in law mean hatred or ill-will against the party slain but an evil mind a mind depraved and malignant nature 2 Wash 548. Fost 256 Keeling 126 7.

2. Our Books inform us that the Court and not the jury are judges of the malice Ld Ray 493. 2 Str 773. Bur 396. 474. 957. 402. 418.

This rule is so blindly given that it is apt to mislead It means that what constitutes malice in point of Law, is a question for the Court, but whether the facts which constitute the malice exist in a given case, is a question to be found by the jury.

3. "Malice aforethought may be either express or implied"

1. When one with a deliberate and formed design to kill another or to do some bodily harm. takes his life the malice is express. Lying in ambush, forming schemes, or old grudges, all are badges of malice express.

2. When the act manifests all mankind, or any one with death who may come within the reach of his mischief. As if one deliberately discharges a gun into a multitude, and kills a person the malice is express 4 Blk 199. 200. 1 Hawk 121-2 Keeling 127 Foster 201.

I conceive the true distinction to be this. Malice express is when the intention in point of fact concurs with the act, but when it concurs only by implication of Law it is implied as if A discharges a gun to kill B and

kills another a doe, not kill him. but there was an intent to kill and it executed with the act. hence the malice is express. if he discharge his gun into a multitude with intent to kill & kills 1 it is malice express. But had he shot at an ox with intent to kill and hurt off. & in the discharge by accident kills B. here the intent concurs with the act by implication for he was fully bent on committing a felony Keling 127. 1 Hawk 122, 1 Bulst 867.

3. If one receives death in a duel there is express malice 1 Hawk. 124. 4 Blk. 199. 1 Hale 443.

4. And at C Law the merciful a challenge is a high misdemeanour 3 East 581.

5. If one attempts without provocation a wife a sister or to do some personal injury & he dies and in the prosecution of his intent death ensues he is deemed to have taken it with express malice 1 Hawk 124. Foster 255. Blk. says it is implied, but he is wrong. Blk 200.

6. If one on a sudden but just provocation wants B. to fare knowing that he dies, it is murder by express malice Keling 127. 1 Hawk 126. 1 Hale 445. 473-4. The case of the Park keeper does not fall within this rule

7. If one on a sudden affray is killed and it appears that the other acted coolly & deliberately the malice is express. Kell 56. 1 Hawk 123.

8. If on committing a burglary with intent to kill one of the house attempting to oppose the villainous he is guilty of murder, but it is not held that the malice is express or implied. but if he acted with express malice the murder is express for the intent was

concerned with the act 2 McNally 69. 1 Hawk 127. 4 Co 40. 9 & 58. Fost 308-10. Kel 66. and the rule is the same in this case if he had killed an officer 1 Hawk. 27 Foste. 35 *

2. Malice implied. 1. This will be, when the killing is in consequence of an unlawful act intended for some other purpose than that of killing the one slain, as if one in discharging a gun at a fowl with intent to steal it and kills a human being it is murder. the malice is implied for the intent did not concern with the act. so if he intended to kill a beast Kelw 13. Hawk 126, Keeling 111-17. Hale 465.

2. when the husband gave a poisoned apple to his wife for her to eat but she gave it to her child. and it killed it, then the husband was guilty of murder and the murder was implied 4 Co 81. Kel. 111. Hawk. 125.

3. But when one kills another by an act which shews itself dangerous to all mankind or in other words which indicates an universal malice to any one who comes within his reach, the malice is express for the intent concurs, with the act 4 Bl. 199. 200 2 McNally 354. 1 Hawk. 113. Fost. 261-2.

4. If one kills an officer in struggling to escape from an (officer) an arrest he is guilty of murder but the malice is implied for here the intent principle was accidental Fo 29. 1 35. 308. 1 Hawk 126-9.

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* But in other cases the officer must be publickly known in his intending character or else (barely) may suppose some unlawful design. But we are always bound to know a public officer. 1 Hawk 127 Fost 35-311.

5. The rule is the same tho the officer did not know the name of the party, only he was a person whom he was not obliged to arrest for all are bound to know them. But if the officer had been created in the time after he arrest if demanded have shewn it and if he did, nor the killing him would not be murder. 4 Co 66-68. 1 Hal 137. 3 H.P.C. 42-18. Co Lit. 280 a. 86. 2 H.P.C. 71.

6. The the law shuns to put on the evidence relative homicide by words strokes and menaces unless you in Heat then is but little room for it. for then is no consequential malice the punishment is the same.

7. All Homicide is presumed to be malicious unless the contrary appears. If one has slain another he is deemed guilty of murder and the murderer is on them to manslaughter. homicide excused or justifiable 4 Co 676. 4 Blk 201. Foster 252. 2 Hale 546.

8. If several are engaged in an unlawful act in one in pursuance of a premeditated design kills a 3rd person they are all guilty of murder. Kelyng 113. 35b

9. The punishment of murder is death 2 Hawk 84. 631. 4 Blk 201.

10. The Judge's Must be by the neck until he is dead 2 Hawk. 631. 2 Hale 399. 4 Blk 403.

11. If a woman during pregnancy is entenced a reprieve is granted until she delivers but not an indulgence will be a second time plead 4 Blk 39. 2 Hale 413.

12. Tho has prevaild a pardon ever that it pleases is not completely executed and the convict

be removed. he is clear this is not true for in such case the Officer must pursue and take him and execute him again for the sentence is not fulfilled until his death. 2 Hawk 658. 4 Bl R 206. 2 Hawk 412.

13. When one murders an Officer who attempts to arrest him the prosecutor is not then that he was an Officer attempting then that he acted as such. 4 Bl R 360. 2 McNac 488 But this is not conclusive in the criminal for he may then that he was no Officer. J. Ford.

Petit Treason

1. When any certain cases where murder, Treason etc is even there admits aggravated malice, it becomes petit Treason. & that all petite Treason is murder but not e converso. Foster 107. 324. 336. 4 Bl R 202, 1 Hawk 131. 1 Bac 140. 1 Hale 37-82,

2 By Stat 25 H. 8 C. 3. No offence can amount to petit Treason, except the three following

1st When a Servant kills his master,

This must mean servants only who are subject to the Master, family Government.

2d When a Wife murders her Husband.

3. When an Ecclesiastic murders his prelate 4 Bl R 203. 1 Hawk 131. 2.

But the fact is not so much the circumstances as must or would be considered in another case. 1 Hawk 132. 2 McNac 574-5. Bac. Abr. Treason.

4. If a Woman avowed "a menses et thori" murders her Husband she is guilty of petit-Treason. But had she been divorced "a vinculo matrimonii" It would be murder only

4 Bl R. 203.

Law of Crimes.

2. If a wife procures a stranger to murder her husband in her absence she is answerable as murderer. But had the stranger procured the wife to murder her husband she would be acting in Pet. Treason, for there in the guilt of the principle and had they both join'd in committing the act, the wife would have been guilty of Petit Treason & Murder. 1 Hawk 132. 1 Hale. 24-5. 5 Bac. Abr. Treason.

3. If a Lunatic kill a stranger shall he suffer as a murderer while he is in a state of total Insanity, this one of the Standing maxims of the Criminal Law. 1 Hawk 132. Hob. 36 & 8. 5 Bac. Abr. Treason.

4. Tho' if a Servant after he has left his master shall murder him from malice conceived before he left his service it is guilty of P.T. 1 Co 88. 14 and 132. 4 Blk 211. For in Criminal Law the intent gives character to the offence.

5. The murder of one Father by a Child is not P.T. unless by reasonable construction it can be made a Treason of his Father. 14 and 131. 1 Hale 380.

6. The Punishment of this crime is death. The mode is. If a male to draw him to the place of Execution on a hurdle, & there hang him; If a female to draw her to the place of Execution in like manner, and there burn her to death 1 Hale 382, 1 Hawk 133, 2 id 631.

7. If one is indicted of Petit Treason, he may be convicted of murder, Latch 61 Law. Lecd Ca Law 399.

Arson

1. This is the malicious & wilful burning of a House or out House of another. 4 Bl. Ch. 220.

1. It includes not only the dwelling House but also all the outhouses deemed a part of the House Stalls, for they are protected by the mansion House and may be the subject of arson.

2. All Buildings are deemed out Houses if they are within the curtilage of the mansion House. 1 Hawk 105-6. 4 Bl. Ch. 221.

3. A Barn filled with corn is the subject of arson at the C Law. tho not within the curtilage 1 Haw 166. 4 Bl. Ch. 221.

4. The mere shame of an House is not a subject of arson. for it is not as yet a dwelling House. 1 Hale 568. 1 Hawk 166.

5. The Burning of a Prison is arson for it is said to be the House of the corporation, but it is more strictly the dwelling House of the prisoners Lease of

6. If it be said to commit an one burning his own house if another is burnt in consequence of it. this is a true rule. for if one burns his own House it cannot be arson - But if another House is burnt that is arson.

4 Bl. Ch. 221 Co Cas 37. 1 Hawk 166.

7. But if one seised in fee, a possessed of a House for years. burns it it is not arson, provided, no other is burnt. 1 Hawk 156. Co Cas 37. Yel. 116. Hale 568-9. 4 Bl. Ch. 221. Keling 29. Foster 115-16.

8. And it is the better opinion that if a tenant from year to year burns his House it is not arson. but it is Waspass, for it is his own habitation Lect 219, 225. But it is a high misdemeanor punishable by fine and imprisonment

for one to burn his own house in a city, tho it is not so on 4 Blk 221. Ruling 29. 1 Hawk 166-7.

9. If a Landlord or tenant burn his own house who in possession of his demesne. It is arson for it is for the time being the habitation of the tenant. 4 Blk. 221. Hawk 166

10. This is an act which comits it a welfare and malicious burning, a bare attempt or an unsuccessful attempt to burn is no burning provided there in the attempt to burn no part was actually burnt, but a burning of a part however small with a welfare and malicious intent is arson, But a bare intent to commit a felony is a great misdemeanor. 1 Hawk. 167. 1 Hale 570. 2 McNal 603. 4 Blk. 223.

11. The burning must be malicious else it is not (Lawful) Arson. 4 Blk 222 1 Hawk 167.

12. If one intend to burn the House of A & burn that of B. it is arson for him is a malicious and felonious intent. 1 Hawk 167.

13. Arson is a Com Law felony and is punishable with death 4 Blk 222-1.374. Clergy is not as yet taken away except in cases of the first 2 Hawk 481. 503.

14. Punishment in Conn. is imprisonment not exceeding seven years. Stat Conn. Rev. 1821. 155.

Burglary.

1. This is the act of breaking and entering the mansion house of another in the night season with intent to commit a felony But it is not necessary to constitute the offence that the felony be actually committed 4 Bl. 224. 1 Hawk. 159. 2 Lil. 360.

2. It is not indispensible that the breaking and entry of a mansion house for it may consist in the breaking of a church or walled-town. 4 Bl. 224. 1 Hawk 162. Bac Abr. Burg. a. McNac 600.

3. When the breaking is of a private building it is indispensible to declare on a mansion house, and if this is neglected the dec will be ill on demurrer. 1 Hawk 162. Bac Burg. B.

4 The word mansion House includes all buildings within the curtilage or homestall as in arson. 4 Bl. 225 1 Hawk 103. Keel 27. 52. 82. Cro. 452.

5 The homestall must be that portion of the ground enclosed with the house by one enclosure or connected with it by another fence. Here a Building within 60 feet of a mansion house. because it was not included nor connected to the mansion enclosure by a fence was held not to be a part of it Burglary 1 Hawk 113. n. Leach Cr Law. 145.

6. If a lodger has an apartment in a house to which he enters by a door distinct from that by which the owner and family of the mansion do not enter to inhabit the other part of it, a breaking of his apartment is burglary on his mansion But if the owner and family do enter by such door.

with the Lodger. Such breaking would be a violation of the Owners habitation Kel 854. 27. Lab 523.

7. An uninhabited house is not a subject of burglary for it is not a habitation

8. If A. lets an out house within his Curtilage to B. such out house is not a subject of burglary because it is annexed from the curtilage 4 Bl K 22. 25, 226, 1 Haw 164. Hawk 33. But if B. lodged in it, it would be his mansion house and consequently breaking would be the burglary 1 Hawk 164. n.

9. If one enters his House for a treasonable with intent to Return, it is in his absence a subject of burglary 4 Bl K 225. 1 Co 40. Foster 77. 1 Hawk 162. Keling 6. 7 Co. 52.

10 And when one having hired a house removes into Keling 46 by 276 it part of his goods it was held to be a subject of Burglary 7. 1 Haw 162. but I conclude it Law this generalization "that any one lodger, tho' it is the house of a corporation. 4 Bl K 225 Leach 67.

11. But a Tent or Booth cannot be the subject of Burglary a arm dwelling. for they are but Tabernacles 1 Hawk 164.

12. An act to constitute the Offence must be done in the "night season". The time is between the evening and the morning Twilight 4 Bl K 224. 1 Hale 310. Therefore it were any time between sun set and sun rise and it is a rule that if there be daylight sufficient for one countenance to be distinctly seen it is not the night season. 7 Co. a. b 1 Hawk 160. 2 McNal 600. 4 Bl. 224

13. To Constitute burglary there must be a "breaking and entering" but they need not necessarily be at the same time for the breaking may be at one time and the entering at another. 4 Bl K 226. 1 Keling 67-8. 1 Hale 551.

Burglary

4. The breaking not only consists in the breaking of doors or windows but in unlocking locks or removing fastenings of any kind 1 Hawk 160. 4 Blk. 226. 2 McNac 601-2.

5. Entering a house thro a chimney is a breaking in contemplation

16. The breaking of any thing within the house is not such within the definition yet it may amount to a felony but burglary is a violation of the right of habitation and is confined to the out-side Keeling 31. 2 McNac. 605.

17. Entering thro an open door is not burglary. and having peaceably entered the house no act within the house will constitute burglary. By some the breaking of an inner door is burglary yet the breaking of a cupboard door is not, and yet I can see no difference between them. 4 Blk. 226 1 Hawk 160. 2 McNac. 601-2.

18. A breaking out. however the person entered if he entered with a felonious intent is burglary. when the entry is before the breaking. This is not fully ascertained like the State of some. 2 Blk 227. 1 Hawk 161.

7. If a servant opens his masters chamber with a felonious intent he is guilty of a burglarious breaking & entering Keeling 67. 2 McNac 601. to 3. 4 Blk 227.

20. If the servant conspires with one without to commit a felony and let him in both are guilty of (felony) Burglary. Star 881. 1 Hawk. 162. 1 McNac 604.

21. So if a lodger in a public house with felonious intent lowers the door and runs of an other lodger it is a burglarious breaking & entry, of the door of the room however. Keeling 67. 2 McNac. 601. to 3. 4 Blk 227.

Entry 1st It is a rule that the entering with the whole of the body or inserting an instrument to answer

the goods. is an entry 4 Blk 227. Fost 108. Kel 57. 2 McNally 603.

The above doctrine as to what constitutes an entry was decided by the 12 Judges of the old Bailey for which see Hawk 162. n. Leach Cr. Law. 342.

2. On an indictment for breaking and stealing you may acquit of the former. may be convicted of the latter Leach Cr Law. 2 Com 881.

3. Where several join to commit a felony and burglary in which some break & others enter. all will be guilty of (felony) Burglary in principals Fost 350 3 Keb 150. 2 Mac 1604 n 604 1 Hawk 102

4. But it is agreeable that there be an intent to commit a felony and therefore where a servant admitted and entered to take his master's goods the thief was a breaking and entering yet there was no felonious intent 4 Blk 227.

5. And it is agreed if the intent was to commit a Spiritual felony 1 Hale 164. Star 481. 4 Blk.

6. But it is by some means, necessary that a felony should have been actually committed the intent is punishable. of the circumstances of which the jury are the judges 1 Hawk. Fost 107. 4 Blk 227-8.

7. After one has been acquitted of the breaking & stealing going the goods of A. he cannot again be indicted for the breaking and stealing of the goods of B. 2 Hale 527. Kel 56-52.

But he could be indicted for the stealing alone qi (not)

8 Burglary is a felony and clergy is taken from all accessories after the fact. 1 Hale 165 - 4 Blk 228.

Larceny

I. Larceny is of two kinds, simple and mixed.

1. Simple Larceny is when there is no circumstance with any other wrong or matter of aggravation

2. Mixed Larceny is, "taking from one Person, or House. 4 Blk 229. 1 Hawk 134.

1st. By the Com Law if the goods stolen, were under 12d. it was Petit larceny, if over 12d. Grand Larceny 1 Hawk 121. 13 Blk 219 or 229. 2d. If several joints steal goods above the value of 12d. they are all joints guilty of grand Larceny 1 Hawk 145.

3. The stealing several times from one Person under the value of 12d cannot be joined so as to make grand larceny, for each is a distinct offence. and each is petit larceny and they cannot be joined to alter the Character of the offence. 1 Hawk 145. n. 2 Hal 719 a Hale 719. a Hab 719. 1 Hus 531.

4. The old opinion that they might be united, and expiated at the Old Bailey by the 12 Judges 4 Blk. 229. 1 Hawk 146.

II Larceny is the felonious taking and carrying away of the goods of another

1st. A "taking" is necessary, every asportation as taking as laid down in the books, includes a trespass. Hence if the parts is not Guilty in the taking the party is not guilty of Larceny in taking away Hal 24. 81. 4 Blk 231. 2 McNally 586.

But this rule has been so qualified by modern decisions that I can omit it the above cited.

2d. To constitute Larceny the goods must be taken from the actual or constructive possession of another. By constructive possession is meant a legal right to possess

Table of Crimes.

Johnson 1 Hawk. 352. n. 1 P.C. 480. 4 Bl 238 1 Hawk 89.

2. If one finds the goods of another and converts them to his own use, he is not guilty of Larceny for he is no Trespass. Ibid.

3. In generall it is said that if one to whom goods are delivered by the owner, subsequently embezzles them he is not guilty of Larceny 4 Bl 230. Co Lit 103. 1 Hawk 134.

4. It is said that if one commits even "animo furandi" the goods delivered to him, he is not guilty of Larceny. The case of a Tailor to whom cloths is delivered runs off with the cloth, for Law is no Trespass But since the time of Ld. Mansfield three persons have been executed at the old Bailey, and it was then held that one delivering to another goods for a Chemical purpose, the man claiming a right to countermand the delivery, if things are executed, "animo furandi" it is Larceny. That is the case being I quoted the case, that there must be a Trespass in the taking I delivered his watch to B. to clean. B ran away with it. on an indictment. B. was held guilty of Larceny. what seems strange to me is that no notice is taken of the old case. in the modern decisions

5. So when one "animo furandi" converts goods delivered to him to work. He was held guilty of Larceny. The principle of this is that as the owner had a right to countermand the delivery he had a constructive possession. 1 Hawk 135-6. n.

6. The same was the case when goods were delivered to B for the purpose of selling and he ran away with them is an ot. Comp 294. Leach 348.

From these examples it appears that to constitute this offence it is not necessary that there should be a trespass in the taking, possession or Removal, 1 Hawk. P. C. 269 - 1 Hale 504 - 1 Vent 158 - 1 Sid 368. But it was adjudged that when one took possession with intent to steal, however he might have been possessed of them, if he converted them "animo furandi" he is guilty of larceny for this all obtained by fraud 1 Hawk 136. Kel 41. 2 Mod 61. 84. Leach 8 Cas. 313 - 66 - 91, 356.

2. If there once a thing was obtained by a voluntary delivery but with a fraudulent intent. The offender cannot be punished for the delivery for the felonious intent altering the nature of the Bailment. For it appears that in fact that he did not intend to take them on that contract but to steal them.

3. But when one purchases goods with intent to run away with them and in fact to steal them and he does run away with them he is not guilty of larceny for here was the consideration performed in pursuance with Leach 95. 401. 358.

8. But if one obtains possession of goods in virtue of an Execution or a judgt obtained by fraud, practised in the Court, he is guilty of Larceny Kell 46. Roy 276. 1 Haw 136.

And I take the modern opinion to be that if a common carrier embezzles goods sent to him he is guilty of larceny and it was always held that if after carrying them to the place directed & there embezzled them he was guilty of larceny, so if he carried them to a place other than that he was directed for in the former the custody of the owner had ceased and the bailee then was a trust of trust. 1 Hawk 136. 4 Blk. 230. Kel 41-2-3. 4 Blk 230. 1 Hale 504. 5.

4. So if a carrier steal a bale of goods which is delivered to him entirely and take a part he is guilty of larceny

This was decided before the modern determination that the offence would be the same if he took the whole 1 Clark 135. 2 McNally 58. 2 Bac. 473. 4 Blk. 230. and the reason is that the bailee had a right to countermand the bailment But if one bails his property for a specific purpose as if he bails a horse to B. for a month. if B. rides away with it and never returns he is not guilty of larceny for then for the space of 1 month he had the right to the horse and had neither the actual or constructive possession. But this supposes the bailment not to have been originally fraudulent as the part of B.

2 Leach 358. [illegible]

1st. If according to the terms of the bailment the bailee at the time of the conversion with a felonious intent. (&c.) had a right to countermand the delivery it is larceny

2d. When the bailment was obtained with an original intent to steal whatever may be the terms of the bailment. if the chattel be found it is larceny

3d. But when there was no such original intent (& the terms whatever) and at the time of the conversion the bailee had no right to countermand a conversion is not larceny 4 Blk 230.

1. A bare non delivery of the goods bailed by the bailee to the bailor is no evidence of a felonious intent. even in those cases where an embezzlement with a felonious intent would be 4 Blk 230.

Larceny.

2. at Com Law if a servant run away with the goods of his master committed to him it was not Larceny but a breach of trust or civil wrong. In the Statutes which puts him upon a Par by Stat 21 H. 7. c. 7 it is made Larceny if the value is 40/ Sterling with exceptions of servants and apprentices under sixteen

3. At the com Law if the servant had not the possession of the goods but the care and receipt of them given by the master and took them away animo furandi it is Theft. 4 Blk 231. PP. 84. 1 Hawk 136.

4. If goods stolen are stolen from the Thief the second taker is guilty of Larceny and the indictment must allege a felonious taking from the owner and not from the first thief. For the owner has devested the whole from a constructive possession, formerly there was a difficulty in framing the indictment. For it was supposed that the goods must be alleged as the goods of the thief. 2 Ld Raym 889. 1 Hawk 136-7.

5. If one steals goods from the county of A and carries them into the county of B both being under the same jurisdiction the thief may be charged as having committed the theft in either county. 1 Hawk 136-7. 2 Bac. 473.

6. Every continuance of the felonious taking is a continuance of the Larceny yet he cannot be punished twice.

7. As the question of what the theft of goods in one foreign State and conveying them into another will make the offender theif in the latter there is a diversity of opinion 2 Johns 177-9.

I am clearly of opinion that it is not theft in the latter State. For if one steals goods in A. and runs into the

Law of Crimes

State of B. it is certainly not Theft in B. unless it is so in A. But whether it is so in A no judge in B. can determine for they have no judicial knowledge of the laws of the State of A. Each State as legislative is criminal jurisdiction is sovereign and independent of all others.

But in Comm. it has been decided that it is Theft in the State of B. But held otherwise in North Carolina Mass. 116.

8. It is a general rule that he who receives goods from a thief knowing them to have been stolen he is guilty of Theft as an accessory. This is explained under "Rec. of Goods".

9. But if an innocent person receives goods from the owner who with an intent to steal he is not guilty of Theft or any offence as accessory. for the thief has not been guilty of Theft in taking his husband goods and if not. there is no principle and if not no accessory. Lea & L. 49.

10. A "conveying away" is also necessary. The least removal from the place when taken amounts to it. hence if one entering another's house and takes the clothes hanging and lays them a bed. he is guilty of larceny. So when one took the goods from a counter and being discovered flew & when a man met a Lady with a diamond and during struggle at it but it being in a case being removed from there only. All these cases are sufficient Carrying away. 1 Hawk. Mo. 2 Bento 215. Latin 287 Foster 108. 2 McNal 592.

10. When one removed a bale of goods from one end of the waggon to another it was larceny. But it is held that taking out a bale of goods with intent to steal but not removing it is not larceny. (But this distinction is too metaphysical. & not followed so. for the bale was removed from the Vent partially if not wholly

-Hawtals 1 Hawk 141. 2 Leach C.C. 229.

11. The taking and carrying away to constitute larceny must be "animo furandi". The mere act of taking, unaccompanied with a felonious intent is but trespass. If one takes his neighbors horse, rides him a few miles and returns them, or exposes them publicly, meaning an intent that the owner should have them, it is not larceny. This question of intent is for the jury. 1 Hale 509. 4 Bl. 232.

12. When one takes considering the personal goods of another from the possession of a third person against his will the Law presumes a felonious intent and the onus probandi is on the taker. Leach C.C. 203.

13. According to the definition larceny consists in coveying away the goods personal of another. Goods real or savoring of the realty cannot be the subject of larceny. Land cannot, nor growing crops nor fruit on trees for being severed the belong to the freehold. The act of taking amounts a trespass, 4 Bl. 234. 1 Hawk 141. 1 Hale 509.-12.

When the taking and carrying away is one continued act they never become personal chattels in the possession of the owner. but where they are severed at one time and carried away at another it is Larceny. If one takes down a door and carries it away, it is trespass but if he cuts it off and at another time comes it away it is larceny. So in this case can it cannot personal property. so of the fruits of land, and the fruit is the same if being severed by one. & they are carried away by another. 1 Hawk 141. 1 Hale 510. 1 Bac 18. 4 Bl. 233 235

14. Stealing a sheep or killing it, with intent to kill is larceny. 2 Mc Lad. 543.

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15. Taking away the Charters of Lands, the Title deeds and exports is found not to be Larceny for they belong to the freeholder and descend to the heir. But in such a case shou'd lie Stra 1157, 4 Blk 234 1 Hale 66. 510. Salk 13.

16. That the taking may constitute Larceny the goods must be of some intrinsic value, and some person must have an interest therein. Hence at C Law. the taking of a Dog is not Larceny for the law deems a Dog a perishing note of no intrinsic value, but only as matter of evidence. But By Stat this is Larceny. 8 G 33. a. 1 Hawk. 142. 2 Bu 90. 470.

17. In Reigate Book "Deer at large" and not enclosed is not Larceny but if they are enclosed and tame or for food they are valuable, & the Taking of them will be Larceny Foster 306. 4 Blk 235. 1 Hale 511. 1 Hawk. 143. 2. Blk 393.

18. But Tame Deer if enclosed tho not for food will maintain the action if they be taken. 1 Hawk 143, 2 Blk 396, 4 Inst 230. There is an exception in the instance of a Hawk. 143. For the taking of this kind Larceny at Com Law. 4 Blk 236. Hale 143. Bac 271.

19. Those domestic animals are not deemed valuable at Com Law and will not be the subject of Larceny, but will support Trover. But all these will be the subject of Larceny by Stat Law. 4 Blk 230-8, 2 & 393 1 Hawk 143.

Money is the subject of Larceny. Leach 48, 56. 254. 403.

20. The taking must be of the goods of another. Goods of which no one is the owner, cannot be the subject of Larceny. as Game &c. 1 Hawk 144, 4 Blk 395.

21. It is said not to be indictable that the owner should be known in the indictment. and that the D may charge the stealing of the goods of an unknown person. But it is said

that at the time the goods must be found to belong to some one else by presumption the must be long to the owner 1 Hawk 144 s. 352, 4 Bl R. 235. 2 Mc Nal. 380.

22. The Goods of a Corporation may be the subject of Larceny.

23 Stealing a shroud from a dead body is Larceny the indictment must charge the taking of the property as of the property of the executor before appointed, to whom &c. 1 Hawk 143. 12 Co 12 s 2, 113

24. Stealing a dead body from the grave is not Larceny but is a high misdemeanor, and indictable at Com Law, 7 T.R. 733.

25. A person under certain circumstances may be guilty of theft in taking his own goods. as if the goods are delivered to a carrier and the bailee take them with intent to charge the carrier with the loss of them, the law presumes the goods in their own to be the carriers. 1 Hawk 135. Cu E 530, 4 Bl R 281,

26. If goods are stolen from a bailee knowing whose the goods are belonging to him &c he is the time same as all strangers Kel 39, 1 Hawk, 115,

27. If a man indictment for stealing it found but not a felonious intent the Court cannot order Judgt for Larceny including the lesser Kel 27 s 29, Leach 247.

Simple grand or petit Larceny is at Com Law ousting

28. Plea in petit Larceny is at Com Law a capital offence and a clergyable felony but clergy has been taken by the Statute. 1 Hawkins 237, 238. 95 s 1 Mc Nally 208, 2 Hawk 19. 2 Hawkins 489. 146 1 Hale. 70 130.

Law of Crimes,

Mixed Larceny.

1. Mixed larceny has all the properties of simple larceny, and some rules apply. But this includes more than simple larceny, because compounded with the aggravation of taking the goods from the house & person of another, the same. 4 Blk 239. 1 Hawk 156.

2. Mixed larceny, when the taking is from the house & the person. the same aggravated than simple larceny is not distinguished from it in its general nature & punishment, & compounded with house breaking by night it is felony. 1 Hawk 151. 4 Blk 239-40.

3. By various Stat. the penal consequences of mixed differs from that of simple-larceny, & in most cases it is ousted of clergy. Bac Ab. Fo. 76.

1st When the taking is from the person. Mixed larceny may be either by stealing, privately or by open force. the person called. Taking pockets. and if above the amount of 12d it is felony. and made capital by Stat. contrary to the clergy. But in simple larceny stealing above 12d is not ousted of clergy. 1 Hawk 47, 4 Blk 241. 2 Mc Nalls. 599.

2. Taking from a person by open and violent assault is Robbery. Robbery is the felonious and forcible taking from the person of another goods having &c. put them in fear &c. The amount taken is of no consequence. The punishment and nature of the offence is the same whether the amount be great or small. 4 Blk 242. 1 Hawk 147.

3. There must be an actual taking from the person an unsuccessful assault is not felony but a high misdemeanour. Robbery is made felony by Stat. Geo. 2d. 4 Blk 2 1 Hawk

Mixed Larceny and Robbery.

4. If one takes goods in the presence of another by violence and putting him in fear it is robbery tho the taking is not directly from the person as if one takes in the presence and sight from a corner 1 Hawk 148. Salk 613. Stra 1015. 2 McNally 596. 6 or 594-6.

5. So if one puts another in fear and takes goods from his servant in his presence it is taking from the person of his master. for the servant when in his master's presence is deemed in law to have no possession distinct from the master. 1 Hawk 148.

6. He who takes goods from another by his delivery when the latter is under the terror of an affray, is guilty of a forcible taking and consequently of robbery.

7. So if one puts another in fear and extorts from him a promise to deliver goods and his promise of such promise does deliver them the extorter is guilty of Robbery 2 McNally 598 1 Hawk 147.

8. The taking of another goods neither directly from his person or in his presence does not come within the description of robbery. but it may be mixed larceny according to circumstances 4 Bl. 244. Cro. C. 478. Stra 1015.

9. Complete ascertainment of the goods after the offence of robbery does not purge the offence. 4 Bl. 242. 1 Hawk 147. 2 McN. 596-8

10. Violence and and putting in fear, distinguishes robbery from other Larceny. Kel 69,-70. 2 Hawk 498.

11. It is not necessary that there should be an actual assault to constitute violence in robbery. and you can infer it enough when the mere taking of goods from the person of him who is robbed and in the presence of another forcibly. and by him knowledge.

taking and carrying away the chattels mentioned in such assault, the violence intended or used must be such as to excite fear, for if no fear is excited there is no robbery. 4 Bl. 243. Post. 128. 1 Hawk. 148-9.

12. Actual force implies a force, in any manner, when the force is combined with robbery, nor is actual battery of any kind putting in fear by a thief, for even if committed it will amount to a robbery. 1 Hawk. 149, n. Fos. 28-9, Leach 203-4, 257.

13. And the violence or putting in fear must be previous to the act of taking, a concurrent-act is not of itself all that the means of taking the things taken, else is no robbery.

14. If a person privately takes property of goods from another by putting in fear it is no robbery but simple larceny as the case may be. 1 Hale 534-5, 1 Hawk. 148, n. 2 Roll 154.

15. The violence must be employed by the offender for the obtaining of money or goods from the person. 2 Russell 299, 1 Hawk 148, n.

16. Of a Joint Landlord & person tried to extort money and does extort money the offence is robbery. Leach 266. 2 McNal. 59.

17. As to what constitutes a "putting in fear" it is enough that there be an assault threatening, or posture evidently and as might naturally excite an apprehension of danger or where fear or reluctance appears to be used. 4 Bl. 243. Post. 128. 1 Hawk 144, n.

18. Any threatening or in common acceptation would be danger or resistance to excite an apprehension of the kind is a "putting in fear," or a threat to charge another

with an immediate cause 1 Hawk 148 n. 178, 296. 2 W Blac. 598-9. Dec. 129.

19 Robbery may be committed under the Colour of begging charity as a begging wth a demand. as pretended pistol and shooting may in consequence. 1 Haw 149. 4 Blk 243. 1 Mod Case. Keel 43. So if money is (given) delivered as an offer to sell a watch of little value, the Case must be ended by the form of beggars 1 Hawk 149. 4 Blk 243. 1 Mod Cas. Kel 43. to the point adjudged 1 Hale 533. 2 W Blac 599. 4 Blk 243.

20. In an indictment for robbery it is necessary to allege that the person robbed was put in fear, or that the goods were taken through putting in fear. but it is sufficient to allege that violence was used, and the putting in fear need be proved Kel 70. 4 Blk 243. 1 Hawk 149.

21 When the offence is charged for putting in fear. it is not necessary to charge that actual fear was excited it is sufficient, if there that there was (acting) violence calculated to excite fear, when one knocked one down behind him & robbed him, the Court presumed indictment to this was robbery tho the party was incapable of fear. 1 Hawk 532. 4 Blk 243. 1 Hawk 149. 2 W Blac 78 or 98. a 598.

22. If one violently and by putting in fear takes money from another under pretence of Warrt. it is robbery for the law will not allow this to be evaded. 1 Hawk 149. 1 Hale 509.

23. It has been matter of debate whether openly taking goods from the person of another without violence will amount to a robbery or to a felony of any kind. It is not taking for the taking is open. as in cutting a hat from a person head no violence is committed. The prevailing opinion is that it is a felony 1 Hawk 150. Ray 275-6

24 If an indictment for robbery on the highway it is not supported by proof of robbery any where else. But if it should be laid to have been committed in the county of A. it may be proved to have been committed in the county of B. for the County is only laid by way of venue, but the highway is by way of description. Leet 53. 2 Hawk 495. 2 McNal 509. 1 Hawk. 149-50. 4 Blk 243.

Forgery

1. This is the fraudulent making or altering a writing to the prejudice of another right 4 Blk 247. 1 Hawk. 335 a 338.

1. Deeds and other authentic writings Patent &c. Letters Deed Wills may be the subject of forgery at Com. Law. As to wills there has been a doubt, the better opinion is, that by Stat. 1 Vict. are comprehended. 1 Hawk 335-8. 21 a 210. 7 Rob 60-5-76. 3 and 66. 4 Inst 69.

2 According to the weight of authority the altering a writing fraudulently any writing not void to deed a will is not forgery at Com Law. 1 Hawk. Cro E. 553. Bl. 265. 1 Sid 10. 155. 451.

3. But by modern decisions the fraudulently altering or making any writing by which the right of another may be prejudiced is at Com Law forgery. 2 Ld Ray 1464. Str 747. Barnard 10. 2 McNal 480-5. 2 Str a 701 a 901. 25 K 606.

4. By various Eng. Statutes any species of writing is made the subject of forgery 1 Hawk 330. 4 Blk 247.

5. If an makes a mistake in the name of another the forgery is complete. tho the testator is living for it is not necessary to constitute forgery that it should take effect. The intent

is sufficient. 2 McNal 483.

6. Not only the actual making a false instrument and writing another's name w the fraudulent altering an instrument will constitute forgery. but other acts will, as if an endorsee to whom a note future and fraudulently made payable to the will a legacy this will be forgery altho the testator signed the instrument 1 Hawk 336 Noy 201.

7. Writing a release on an obligation of any kind over a name written in blank, is a forgery. the instrument is forged tho the name is not forged.

8. Forgery may be committed by making the mark of another 1 Hawk 336. 2 Bac 567. Lach 61.

9. It must in an indictment the name of a person against whom the grand jury have not found a Bill of such fraudulents is forgery 3 Mod 66 Salk 172, 1 Hawk. 336, 12 Mod 496.

10. Fraudulent altering a deed in a material part is forgery 11 Co. 27. a. 1 Hawk 336

11. But an alteration in an immaterial part, as erasing a writing an insignificant word, is not forgery 1 Hawk 216. a. 2 Ld Ray 1116 Finch then authorities and an Extract of a Bag Ca.

12. One may be guilty of forgery by making an instrument a deed in his own name, as if A. seal a deed to B, and a subsequent deed to B. not stating the one to C. that is forgery for he intended to defraud B would be different were the mistake Noy 101, v4. 2 Bac 566. 1 Hawk 336. Contra Dyc. 288.

13. But the writing sealing and delivering instrument in another's name expressed under in the presence of the person by his direction, is an agent, and this act cannot be forgery 1 Hawk 337.

14th It is constitute forgery in any case the altering a writing must be fraudulent. If an obligee in a bond of £20 alters it to 20 Cts he would be not punish for guilty of forgery, but of the

had raised it from 20 Cts to £20. it would have been forgery. or if the obligor had erased the sum from £20. to 20 Cts. it would have been guilty of forgery 1 Hawk 337, Salk 375, 2 McNally 637, Roy. 99.

Even in the case of the obligee altering the bond from £20. to 20 Cts. it would be forgery if he did it to defraud a 3d person. or to prevent himself 2 Bac 567, 1 Hawk 337, M. Alvord a Bond vs B for £1000 and covenants to pay him it to C. and then alters it to 1000 Cts this is forgery

2d It is a general rule that an erasure will not amount to forgery that the intention be fraudulent. As if the interest omits the insertion of a release in a deed But if an obligee alters without making a limitation in the will it would be a forgery of dom fraudulently, 1 Hawk 337, Roy 101.

3. The act must be to the prejudice of another" But it is not essential that the person be actually injured It is sufficient that he might be injured.

III In an indictment for this offence it is necessary to state a generality, intent to defraud with stating a particular fraud and matters pointing out the manner the intent alleged, is "that the act was intended to defraud. 2 Lil Reg 1466. 737. Ku 747.

1st It is not necessary for this reason. That the instrument be known is published a Bond or a general one A forges a Bond vs B. and keeps it locked in his desk if done with a fraudulent intent he is guilty in law,

2d On the same principle the making of a petition writing in the name of a fictitious person will be forgery if it is false in any particular and generally. as in a Bill of Ex. &c. Lord Hale 83 182, 216.

3d When a Party, in whose favour, an instrument is made, makes an alteration it is forgery 1 Ld Raym 6.

variance, Of Perjury. 467

1. In a prosecution for forgery the least variance between the instrument recited in the dec. and the one proved will be fatal. If however the indictment contains a common count, but which is not executed, into another word, the allegation is immaterial. Leach 889.

2. If one is indicted for forging a writing purporting to be a particular instrument and the writing and the dec. disagree &c. if the writing is not proved as laid. The variation is fatal. Dorr 287, 302. 1 East. 180 n. 180. n.

Recitation, 3. In an indictment for forging the instrument alleged to be forged must be recited at full length in words and figures as it is, if it is not sufficient to recite the tenor of the instrument for a question of law must say what the instrument is in the effect of forging a writ. 1 East 180 n. Dorr 287. 302.

Punishment, The punishment at Com Law is fine pillory and imprisonment, by Pa. Stat Laws. it is a felony and punishable with death. 4 Bl. 247, 250, 1 Hawk 247, Forte 116.

Perjury.

1. This is defined to be the swearing, wilfully absolutely and falsely, in a matter material to a point in issue under a lawful oath administered in a judicial proceeding, hence it is a positive false swearing. 4 Bl. 137, 1 Hawk 318

2. It is essential that the false swearing be wilful and it must clearly appear. If one falsely testifies to a matter under a mistake, although culpable a

pari admittatur. but it not quere of any other 1 Hawk 319. 4 Blk 137. 2 McNal. 635. 2 Salk. 513.

3d. It must be in some "judicial proceed" or it must be before some Court, or Officer of Justice of the Peace, having authority to administer it, but in private proceedings relative to a civil or criminal prosecution, there it cannot be perjury. 1 Hawk 319. 4 Blk. 137. Hob 62 Cro E. 168, & 169.

1. It is immaterial whether the Court is regular or not, 2 McNal 470. 2 Burr 1089. 1 Hawk 315. 2 Ld. 101.

2d follows that any voluntary promise out of court perjury tho Judge, 1 Hawk 320, 1. 1 Vent 369-70. 4 Blk 137. On this point a contrary doctrine was once held. 2 Roll 257. Yelv. 72.

2. It may be committed in an affidavit, a deposition & when evidence given in Court "viva voce", and tho' tho' the deposition should never be used in Court, for the perjury was complete on making the deposition &c. 1 in 7 G. R. 315.

3. According to the definition of perjury, it is not punishable by prosecution for breach of Office or if a Judge or Justice should violate wilfully his oath of Office 1 Hawk. 320-1. 2 Roll 257.

4. It must be made to a "point material to the question" but it is sufficient if it should be made to that point which supported the judgt. 1 Hawk 320. Cro Car 146.

1st. And a Party to a suit may commit perjury (as an independent witness may) when he testifies in his own or he may in many instances, so may a deft in chancery perjure himself in his answer, Bac 239. 2 McNal. 470.

2d. Indeed there are many cases in which the parties are the only evidences & allowed to give evidence, for putting

trines &c. 1 Hawk 322. 3 Bac 815.

3. And it is immaterial whether the jury were to find the truth or not, provided the witness did not know it to be true, for if he maliciously swears that to be true which he does not know to be true he is guilty of perjury, 1 Hawk. 322. 2 Ld Raym. 1177. 3 Mod 122. 6 T. R. 537, for the intention of the statute is to keep the ends of justice

4. It is said that the perjury must be absolute and direct, and if a man qualifies his testimony as thus, "I do remember the matter of any collateral circumstance it is not perjury, 1 Hawk 323. 3 Bac 815, but if he takes upon him to swear, for if the witness knows that to be material which he testifies he believes to be true it must be perjury and the civil damages are recoverable, 1 McCord 262. 3. Leigh & L. 301. 2 Bibb 385,

5. The false testimony must be upon matter to the question in issue, if it is upon immaterial circumstances only it is not perjury for it does not affect the ends of justice, nor have that tendency, 1 Hawk 323-4, Yelv 53. Cro E. 500. La Raym 258.

6. Circumstantial evidence, when positive enough to support an indictment for perjury and indeed the great part of the records in Courts of justice are founded upon such evidence

7. And it may amount to false testimony to swear to a mistake concerning (in the quantity of damages) in relation to (not direct) things, as in case, 1 Hawk 233. 5. Co. Ja. 212, 12 Co 101.

8. If in said examination testimony may be the subject of perjury even if it is made to the understanding of the jury to whom such oath is taken part of the testimony which is mistaken 1 Hawk 323-4 La Raym 258. Dal. 282. But this is not well settled,

9. If in an Indictment it be stated that A. beat B. with a Sword, when in fact it was with a Staff that it was not necessary for the testimony is as to the beating, when it is material, But would it not be otherwise if it had a tendency to aggravate damages & greatly increase the damages 1 Hawk 322-3.

10. But if no consequence in what degree the false evidence was material if it was material at all 2 Ld Raym 1288. 1 Hawk 320, 2 Ld Raym 869.

11. And whether it is material or not it is for the Jurors to decide. And it is never enough for them to prove that testimony to be false, but he must also prove it to have been in some respect material, for the materiality is an ingredient part of the definition 1 Hawk. 320,

12. If it not appear that the false testimony was believed by the Jurors, or that any Court have been actually misled by it, for it is the endeavour to abuse the ends of Justice that constitutes perjury 1 Salk. 255. 2 Leach 911, 3d 280.

13. The word "wilful" is not indispensable in the indictment, tho it enters into the definition for it is enough to aver that he "falsely & maliciously swore" for if, as it is either, it is not,

14. That crime cannot be established against any one except upon the testimony of at least two witnesses for the prisoner, until found otherwise is presumed innocent even if there is but one witness, it is not to exceed 1 Hawk 320, 1 Salk 285, 1 Ld Raym 195, 11 Mod 147, 2 Ld 635,

15. Two persons cannot be indicted jointly for perjury if it is confined to the oath of one, for it is impossible for the court to say which of both the two of them

another 4 Bac. 246. 2 Bac 5. 2 Le Raz 886. 1 Hawk 325. 2 McNal 637.

Subornation of Perjury

1. Is the offence of procuring of another to commit perjury but to constitute this offence the perjury must have been actually committed 1 Hawk 325. 226. 4 Bl R. R. 137-8. 2 McNal. 637. 3 Inst 122

2. But the mere enticing one to commit perjury is of itself a high misdemeanour 1 Hawk & Hale 325-6.

3. Two can be joined for subornation of perjury

4. Both perjury and subornation of perjury at Com Law offences and are now punished in Eng? by fine, imprisonment and sentence ever after incapable of giving in evidence 4 Bl R 138.

5. As in a conspiracy of perjury that the offender cannot take any advantage either that of a witness a person whom cannot be admitted join a judge, this is the consequence of the legal infamy of the crime 2 McNal 227-8. 3 Bl R 363

6. A false affirmation is followed by all the legal consequences of a false oath, the offender indeed is not indicted of perjury but of a false affirmation the legal consequences are the same.

In Crimin Mens Offences rede (Black. Com.)

In Comm: False swearing, with intent thereby to convict the criminal of a capital crime is punished with death Stats Comm. Rev of 1821. 151.

Law of Crimes,

Proceedings
to be had
When one is arrested for a Criminal Offence.

1st When one is arrested and brought before a magistrate he is forthwith to examine the case & enquire whether the criminal ought or ought not to be held to trial and this is his duty 4 Blk 296.

2. It is usual to inform the prisoner that he is not bound to answer any question that may be asked or drawn out by the examination of the Prosecutor, the state of Phil. & may authorize the examining magistrate to take down in writing the prisoners confession and this is called the examination before the Magistrate but it cannot be received in evidence but only to refresh the memory of the justice authorized to take down the prisoners confession 4 Blk 287, 296.

2. In Court when it is to be given in Evidence, that the prisoners confession may be given in evidence against him by witness

3. On closing the enquiry it is the duty of the magistrate to discharge or hold him to bail, and when the case is plain if the accusation is clearly grounded & that the offence charged has not been committed it is the duty of the magistrate to discharge the prisoner

But if there is probable ground of suspicion against him it is his duty to hold him to bail and the law may do by committing him to prison, or admitting to bail. 4 Blk 296.

4. In taking a prisoner in order to his commitment or bail giving security, that he shall be forthcoming to abide the sentence of the Law.

5. When any person comes in whose Bail is never allowed. Those are called Offences not Bailable. When all others called Bailable and are bailable

6. All Offences below the degree of Felony admit of Bail, if the person can procure sureties and it is discretionary whether the person is or can be admitted by Common Law or Statute. 2 Hale 27. 4 Blk 297, -8.

7. By Habeas Corpus all felonies even bailable at Com Law. by others all are excepted but such by the latter clause all those are bailable at Com Law. 1 Bac 220. 1 Hale 97. 4 Blk 298.

8. The Stat Westm: 2d. 3 Edw. 1st denies Bail in Treason and many Felonies and the right is further restrained by various other Statutes the Statute in this subject are penned pari passu here 4 Blk 298.

9. When Statutes deny Bail in any case of felony when the prisoner confesses the guilt or when he is notoriously guilty or when he is taken in the manner of felony as when he has the goods taken in his back &c. in such)

10. But the Kings Bench may grant Bail to those out of the jurisdiction of common bailing Officers, but not the Court of Kings Bench for this Court may or may not bail in Cases and offences bail for any offence or crime whatever Hobart 90. 4 Blk 299. 2 Hawk. 175-1, Comp 334 4 Bac 217.

11. The Ct of K. B. will not hear motions relating to the matter of practice admit to bail only under particular circumstances shewing it proper if 1st when the trial has been unnecessarily delayed 2d when the evidence against the prisoner is very slight 3d when the life of the person could be saved by any indictment. In either of these cases the Court bails 2 Hawk 15, 17. 175-6 Salk 464-5. 104 334. Stra 49, 543.

Lex Terminii.

12. When one is admitted to bail in a charge of felony he must be present in the trial, for he can be convicted of felony which is his present. He must be present that the jury can look upon him. Tho' in misdemeanors his presence is not indispensable but he may appear by attorney. This is a rule of practice but it is dispensed with by the presence of a court, 1 Chitty 59. 4 Bl. 375.

13. The prisoner is not admitted to bail after verdict found of his guilt, which by presumption of the prosecutor,

Judgment.

1. The Judgment in every case is that he should undergo the punishment inflicted upon it is it is not a fine but which he is forthwith committed to the custody of the sheriff 1 Chitty 59. 1 Burr 159.

2. It is the only probably in every State that the Supreme Court has similar power with the K.B. in Eng. and when a Stat forbids bail in a certain offence it does not extend to the Supr. Court, but only to the ministerial of the Ct of Enquiry, in common bail's office. That is a general rule that he who is the final judge of the offence may bail in effect, the examining in ... case, 2 Bl. 420-5. 2 Hawk 145.

3. In Eng. the bailing office is the Sheriff of the County.

4. In Comm. it is the magistrate of the court of enquiry, but after commitment, the Sheriff may admit to bail in most records as the magistrate may desire to be taken but here the Sheriff has no original power to bail

5. By the Com. Law of the magistrate takes sufficient bail and the sureties do not abscond

he is liable to a fine, 2 Hawk. 142. 4 Bl. 297.

6. Lemonds That if the parties were present at the time no subsequent cause could render the Magistrate liable to the Consequences for it is the Ministers act and of great Hazard.

7. The Eccl. Practice requires in felony four writs and two in any inferior offence 2 Hawk 141. 10 Co. 101. 2 Hale 125.

8. In Connecticut there are but two requisite in any case, Keeping Bail when the person can demand it is a misdemeanor, So that in bailable offences the Magistrate may either by committing or taking bail render himself liable to the Common Law penalty.

9. But he is not obliged to admit a bail unless the parties are in his judgt. sufficient, But if the parties offered are sufficient he is bound to do it, and an action of Trespass on the case lyes for refusing 2 Hawk 143. 1 Burr 228.

10 So also on the other Hand, admitting to bail in an offence punishable by, when the admission of bail is forbid by law, is punishable at Com Law as is an escape it is at Com Law punishable by fine but is also punishable by various Statutes, 2 Hawk 142. 216. 1 Hale 596-7.

11. If the person is acquitted by the court for which he was arraign'd, but is put on trial to be guilty of another offence it is the duty of the Court to direct him until another indictment is made out against him, Leach & C. 300. 355.

End of Law Criminal,

End of Vol. 13th

Notes &c.

Page. 125. Sec. 39. Note 1. The limitation of action on Book. provided by our Stat. is six years and in the construction of it it has been decided. that articles charged on Book of more than six years standing may be exhibited and applied to articles charged within six years as payment. but that no recovery can be had for articles of more than six years standing. 1 Bay 245.

181. Sec. 4. Note 2. This rule appears to be laid down without any reference to a request made by the debtor as to which debts it should be applied. I should presume that if the debtor directed the tender to be applied to a particular one of the debts. the creditor could not consult his own will. but must apply it to the particular one directed.

177. Sec 2. Note 3. There is a Stat of Gott off more in this State allowing a "set off" of mutual debts. where the Deft resides out of the State or is a bankrupt or insolvent.

186. Sec. 10. Note 4. The authorities cited 2 Wils 300. does not support the fact that the words "he is in gaol for stealing a horse" is actionable, In the case cited in Wils. the words of the Deft were proved to be false and malicious. Espinasse appears to make the right distinction, Esp. Dig 497. that in this example the facts are incorrectly stated. if the law laid down in Saund. 2 Vo 47. n 1. is correct, but the principle is the same.

228 Sec 41. N. 3 } 275 Sec. 40 Note 6 } It would appear to me. that the privilege of the person should appear upon the face of the pleas. the proofs. to make the officer liable. for how could he otherwise know the privilege.

196. Sec. 58. note 7. } I should conceive in this case that the word was sufficient for to charge a man of fraudulently concealing an estate and his manner would imply that in consideration of services rendered — or by disclosure in Equity. when this case must be referred

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GOULD'S

LECTURES

VOL. II

F. CHITTENDEN